Supreme Court, U.S.
FILED

01 820 NOV 27 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

EDWARD REYNOLDS, Superintendent,
Mohawk Correctional Facility,

Petitioner,

-v-

GEORGE MORRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT T. JOHNSON
Bronx County District Attorney
Attorney for Petitioner
Counsel of Record
198 East 161st Street
Bronx, NY 10451
(718) 590-2156

ANTHONY J. GIRESE
JOSEPH N. FERDENZI
RAFFAELINA GIANFRANCESCO
Assistant District Attorneys
Of Counsel

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(9964 – 2001)

Printed on Recycled Paper

128pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Double Jeopardy Clause is violated when a court accepts a plea without the consent of the prosecution but then vacates it prior to sentencing.

2. Whether a ruling of a state court can be contrary to this Court's clearly established precedent when this Court has never previously addressed a particular legal scenario.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

State Court Proceedings 2

a. Indictment and Plea to the Misdemeanor Charge 2

b. The Article 78 Proceeding in the Appellate Division 4

c. The Article 78 Proceeding in the New York Court of Appeals 5

d. The Judgment of Conviction 6

The Habeas Corpus Petition 6

a. The Magistrate Court Proceedings 6

b. The District Court Proceedings 7

c. The Second Circuit Opinion 8

REASONS FOR GRANTING THE WRIT OF CERTIORARI 9

CONCLUSION 13

APPENDIX

A. *Morris v. Reynolds*, 264 F.3d 38 (2d Cir. 2001) 1a

B. *Morris v. Reynolds*, 107 F. Supp. 2d 421 (S.D.N.Y. 2000) 23a

C. Report and Recommendation of United States Magistrate Judge Andrew J. Peck 59a

D. *Van Leer-Greenberg ex rel. Morris v. Massaro*, 87 N.Y.2d 996, 665 N.E.2d 188, 642 N.Y.S.2d 618 (1996) 95a

E. *Van Leer-Greenberg ex rel. Morris v. Massaro*, 215 A.D.2d 283, 626 N.Y.S.2d 779 (1st Dept. 1995) 98a

TABLE OF AUTHORITIES

Cases: **Page**

Albernaz v. United States, 450 U.S. 333 (1981) 9

Brown v. Ohio, 432 U.S. 161 (1977) 10, 11

Morris v. Reynolds, 107 F. Supp. 2d 421 (S.D.N.Y. 2000) 1

Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001) 1

Ohio v. Johnson, 467 U.S. 493 (1984) 6, 7, 10, 12

Serfass v. United States, 420 U.S. 377 (1975) 10

Van Leer-Greenberg ex rel. Morris v. Massaro, 215 A.D.2d 283, 626 N.Y.S.2d 779 (1st Dept. 1995) 4

Van Leer-Greenberg ex rel. Morris v. Massaro, 87 N.Y.2d 996, 665 N.E.2d 188, 642 N.Y.S.2d 618 (1996) 5

Williams v. Taylor, 529 U.S. 362 (2000) 13

Constitutional Provisions:

United States Constitution, Fifth Amendment 1

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 2

28 U.S.C. § 2254 ..... 1, 2

New York Civil Practice Law and Rules
Article 78 4

New York Criminal Procedure Law § 210.20 2

New York Penal Law § 265.01 2

New York Penal Law § 265.02 ..... 2, 6

OPINIONS BELOW

The Court of Appeals opinion below is published at 264 F.3d 38 (2d Cir. 2001). The United States District Court order denying the writ of habeas corpus is published at 107 F. Supp. 2d 421 (S.D.N.Y. 2000).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 30, 2001. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which states that cases in the Court of Appeals may be reviewed by the Supreme Court by a writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

28 U.S.C. § 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Review of a judgment of a United States Court of Appeals decision is sought. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 2254. The court's power to grant the writ derives from 28 U.S.C. § 2241.

The State Court Proceedings

a. Indictment and Plea to the Misdemeanor Charge

On or about December 9, 1993, the Grand Jury of Bronx County indicted George Morris for the crimes of Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02), a class "D" felony, and Criminal Possession of a Weapon in the Fourth Degree (New York Penal Law § 265.01), a class "A" misdemeanor.[1]

On March 4, 1994, respondent moved for an order pursuant to New York Criminal Procedure Law § 210.20 for an inspection and dismissal of the Bronx County indictment. The prosecutor opposed respondent's motion, but provided the court with a copy of the Grand Jury minutes, asserting that the minutes established each element of the charged crimes.

On May 10, 1994, the trial court announced the dismissal of Criminal Possession of a Weapon in the Third Degree. The judge gave no basis for the dismissal, nor did it issue a written order. On the next adjourned date, June 7, 1994, the court indicated that it had previously dis-

---

[1] Mr. Morris was charged with possessing a loaded, unlicensed 9mm pistol, while inside a store.

missed the felony count of the indictment. Defense counsel stated that she did not have a copy of the decision and asked if there was one in the file. The court replied that there "probably" was.

On August 1, 1994, upon the court's suggestion that it would accept a plea, respondent elected to plead guilty to the Class "A" misdemeanor, Criminal Possession of a Weapon in the Fourth Degree, in exchange for a promised sentence of three years probation. Before the plea was taken, the prosecutor, in an off-the-record conversation, asked the court for a copy of the written decision. The court did not have a copy and proceeded to accept respondent's guilty plea, in the course of which respondent admitted possessing the loaded, unlicensed gun. After the plea was taken, the prosecutor was informed by the court's law secretary that the written decision was not "completed," but that, contrary to the court's oral pronouncement, it would reflect that the court had in fact found the Grand Jury evidence to be legally sufficient to sustain the felony count in the indictment.

In the written order dated July 29, 1994, the court denied respondent's motion to dismiss the indictment or any count therein, finding that there was sufficient evidence adduced before the Grand Jury.

On October 21, 1994, the court vacated respondent's misdemeanor plea and reinstated the Criminal Possession of a Weapon in the Third Degree felony count because the plea "was obviously made under the impression that [the felony count] had been . . . dismissed," but, in fact, the announcement that the felony charge had been dismissed was "incorrect." The court stated that "[w]hen the matter was reduced to the written decision, [the] Court realizing

its own error, corrected itself," and asserted that the decision of July 29, 1994 stood.

b. <u>The Article 78 Proceeding in the Appellate Division</u>

Respondent brought a collateral proceeding under New York Civil Practice Law and Rules Article 78 to prohibit the trial court from vacating his plea and to compel the court to impose the promised sentence. Respondent contended that the trial court, in the absence of fraud, lacked the legal authority to *sua sponte* vacate the plea without his consent and lacked the authority to reinstate the felony charge. Respondent specifically pleaded that the trial court's refusal to impose the promised sentence violated his "double jeopardy rights under the Constitution of the United States."

The intermediate appellate court, in a 3 to 2 decision, granted the Article 78 petition. *In re Van Leer-Greenberg ex rel. Morris v. Massaro*, 215 A.D.2d 283, 626 N.Y.S.2d 779 (1st Dept. 1995). The majority noted that the People failed to point to any statutory authority authorizing a court to withdraw a plea without respondent's consent, in the absence of fraud and misrepresentation. The majority also found that "[a]lthough the court's ruling in dismissing the felony count was oral and later, on reflection, it was attempted to be withdrawn, full agreement having been reached prior to the withdrawal, and there being not change in circumstances the defendant was entitled to the benefit of the bargain."

The two dissenting justices asserted that the trial judge had "the inherent power to vacate the plea, which would have been improper, prior to the imposition of the sentence and to correct his own error and reinstate the

previously dismissed charge." The dissenters noted that any further proceedings would not violate the Double Jeopardy Clause of the United States.

c. The Article 78 Proceeding in the New York Court of Appeals

Leave to appeal was granted, and New York's highest court, the Court of Appeals, unanimously reversed the Appellate Division decision and dismissed the petition. *See Van Leer-Greenberg ex rel. Morris v. Massaro*, 87 N.Y.2d 996, 665 N.E.2d 188, 642 N.Y.S.2d 618 (1996).

The court determined that "[a]lthough no formal decision was rendered on the [omnibus] motion, the Trial Justice, on two different pretrial court appearances, announced from the bench that the felony charge was dismissed." The court noted that, based on this premise, the trial court accepted a plea of guilty to the misdemeanor charge and agreed to impose a sentence of three years probation. The court found that "[s]ometime thereafter,"a written decision dated July 29, 1994, denying the motion to dismiss, and sustaining the felony count of the indictment was filed.

The court, citing to its own precedent, stated that, "[b]efore sentence is imposed, trial courts in criminal cases have the general inherent authority to correct their own mistakes." It concluded that "[i]n a standard application of this principle to the unusual developments here, the Trial Justice cannot be said, as a matter of law for prohibition purposes, to have improperly exercised such authority."

d. The Judgment of Conviction

On June 4, 1997, a judgment was rendered in Supreme Court, Bronx County, convicting respondent, after a guilty plea, of Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02) and sentencing him to an indeterminate term of imprisonment of from two and one-half to five years. Respondent did not appeal from that conviction.

The Habeas Corpus Petition

On May 21, 1999, George Morris filed an amended petition for a writ of habeas corpus, claiming that the trial court lacked the authority to *sua sponte* set aside the guilty plea and reinstate the felony count without respondent's consent, and that this vacatur offended the Double Jeopardy Clause of the Federal Constitution.

The Magistrate Court Proceedings

The Magistrate Judge, reviewing the claim *de novo*, noted that this Court has not directly addressed the question of whether jeopardy attaches for double jeopardy purposes upon a court's unconditional acceptance of a guilty plea. Nevertheless, the Magistrate determined that, in *Ohio v. Johnson*, 467 U.S. 493 (1984), the "Supreme Court appears to call for an analysis of the defendant's interests in 'finality and prevention of prosecutorial overreaching'," and requires a court to ensure that the State has "one full and fair opportunity to convict those who have violated its laws." The Magistrate concluded that "[u]nder the circumstances at bar - where the trial judge dismissed the greater charge and unconditionally accepted the guilty plea to the sole remaining lesser count with the prosecutor's approval (or at least without

objection by the prosecution) - [respondent's] guilty plea amounted to a conviction for purposes of the Double Jeopardy Clause, and thus a subsequent prosecution on the reinstated felony count was barred."

The District Court Proceedings

The District Court recognized that the "Supreme Court has not addressed the specific issue related to double jeopardy that is the heart of this matter - - whether jeopardy attaches in connection with and at the time of the acceptance of the guilty plea." The court determined that the "essence" of the New York Court of Appeals' decision could be read as "analogous to, not inconsistent with, or supported by reasonable inferences flowing from the doctrine the Supreme Court [ ] enunciated [in *Ohio v. Johnson*]." Thus, the District Court concluded that:

> In the absence of clearer and more definitive Supreme Court guidance bearing on the double jeopardy issue presented here, [respondent] has not established that the New York Court of Appeals' adjudication of the issue on the merits resulted in a decision that was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court . . . Moreover, [respondent] has not shown and this Court cannot conclude that the New York Court of Appeals identified the correct governing legal principle from the United States Supreme Court's decisions but unreasonably applied that principle to the facts of [respondent's] case. *Id.* at 1521-22. On this basis, the Court of Appeals' action cannot be

> deemed objectively unreasonable and was fully consistent with applicable habeas corpus law.

The District Court went on to say that it agreed with the State's claim that the prosecutor could not have prevented respondent's guilty plea to what appeared to be the only existing count remaining in the indictment, and that the State was unable to appeal the trial court's dismissal of the felony count because the decision had been rendered orally without any explanation, and no written order had been served on the parties. Therefore, the District Court found that "[o]n this analysis, this Court cannot fairly read the facts to support a finding that the State 'never objected to [respondent's] guilty plea or to the dismissal of the felony charges.'" Significantly, the court also observed that "[t]his record simply lacks a solid grounding of evidence manifesting the kind of purposeful prosecutorial abuse or overreaching that the Double Jeopardy Clause was intended to curtail."

On August 3, 2000, Judge Marrero granted a certificate of appealability.

The Second Circuit Opinion

The United States Court of Appeals for the Second Circuit reversed the decision of the District Court and granted the petition for a writ of habeas corpus. The Second Circuit found that this Court has clearly established that when no greater offense remains pending at the time a plea is accepted and the prosecution has not objected to the plea, the Double Jeopardy Clause bars reinstatement of the greater offense after the plea is accepted. The Second Circuit found that although a court has the power to correct its own errors, "when the correction of those errors infringes a defendant's rights under

the Double Jeopardy Clause to finality and repose, the power to correct mistakes must cede ground."

The court determined that the New York Court of Appeals, in rejecting respondent's double jeopardy claim applied the following rule, "[t]he double jeopardy bar does not arise until after conviction and imposition of sentence because 'trial courts in criminal cases have the general inherent authority to correct their own mistakes,' prior to sentencing." The court explicitly found that the state rule contradicts the governing law established by Supreme Court precedent, which holds, that the double jeopardy bar arises, after a conviction but before sentencing, when a defendant pleads guilty to a lesser included offense, the prosecution did not object to the plea, and there was no greater offense pending at the time the plea was accepted.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case offers this Court an opportunity to clarify the law in an area which Chief Justice Rehnquist has aptly characterized as "... a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981). The need for such clarification is amply demonstrated here. The Second Circuit, attempting to fill a gap in this Court's precedent, has misapplied it, and has fashioned a rule, whereby, despite suffering no prejudice, respondent unfairly benefits from a trial court's error. The Circuit explicitly ruled that a trial court which erroneously accepts a plea to a lesser offense without the encouragement or consent of the prosecution cannot rectify its error and restore a defendant to his pre-pleading status. In so holding, the Second Circuit has declared the holding of

the New York Court of Appeals - - that the Double Jeopardy Clause does not prevent a court from correcting its error prior to sentencing - - contrary to this Court's clear precedent. However, there is no Double Jeopardy decision from this Court addressing this legal scenario. Hence, this case squarely presents two issues that are novel and important: whether the Double Jeopardy Clause is violated when a court accepts a plea without the consent of the prosecution but then vacates it prior to sentencing; and, whether a ruling of a state court can be contrary to this Court's clearly established precedent when this Court has never previously addressed a particular legal scenario.

The Double Jeopardy Clause affords a defendant three protections: "'[I]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (citing *Brown v. Ohio*, 432 U.S. 161, 165 [1977] quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 [1969]). It is "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Serfass v. United States*, 420 U.S. 377 (1975). The double jeopardy protections ensure "that the State does not make repeated attempts to convict an individual thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." *Ohio v. Johnson*, 467 U.S. at 498-99. In this case, respondent was not subjected to repeated prosecutions or multiple punishments.

Quite simply, what occurred here was that the trial court, upon realizing that it had erroneously accepted a

plea without the consent or encouragement of the prosecutor, vacated the plea. The prosecutor had objected to the dismissal of the felony count of the indictment, but before the State could exercise any appellate remedies, the court accepted a plea to the remaining misdemeanor count. Thus the government was denied an opportunity to convict respondent on the felony count through no fault of its own. This is hardly a legal scenario akin to a prosecutor who indicts a defendant for the greater offense after he has pled guilty and served his sentence for the lesser offense (*see Brown v. Ohio*, 432 U.S. 161 [1977]). Rather than being the victim of governmental oppression, the defendant in this case wishes to reap the windfall of a court's error as his due. Here, the courts of New York simply deprived respondent of a bonanza emanating from a lapse in the trial court's record keeping and organization, which was rectified before respondent was prejudiced.

It is interesting to note that the state of the law in this area is well illustrated by the tangled course of this litigation among the various courts which reviewed the legal issues presented. Obviously, the trial court did not believe Double Jeopardy provisions would be violated when it vacated the guilty plea and reinstated the felony count. However, the intermediate appellate state court, in a 3 to 2 decision, held that the trial court was wrong, with the dissenters explicitly concluding that the vacatur of the plea was proper and that further proceedings were not barred by double jeopardy. Upon review by the highest court in New York State, the decision of the intermediate appellate court was reversed because the court unanimously concluded that no Double Jeopardy prohibition arose under these circumstances.

This leap-frogging divergence of opinion also prevailed in the federal courts. The Magistrate Judge concluded that respondent's double jeopardy rights were violated and that the writ should issue. The District Court Judge declined to adopt the report, finding that in the absence of clearer and more definitive Supreme Court guidance, respondent failed to establish that the New York Court of Appeals's decision was contrary to or an unreasonable application of this Court's precedent. Lastly, the Second Circuit, applying principles of finality and prosecutorial overreaching, which were addressed in *Ohio v. Johnson, 467 U.S. at 493*, found that this Court has established that, after a court accepts a defendant's guilty plea to a lesser included offense, prosecution for the greater offense violates the Double Jeopardy Clause. While the Second Circuit cited no precedent from this Court that decided the double jeopardy issue in the context of the present legal scenario, the Circuit concluded that the ruling of New York's highest state court was, nevertheless, contrary to clearly established precedent. It seems altogether improbable that a case that has engendered such a divergence of judicial opinions could be one for which there is such clear law from this Court.

Moreover, this direct conflict with the New York Court of Appeals will create uncertainty with respect to any number of convictions from New York, which comprise the bulk of the habeas petitions in the Second Circuit. New York's lower courts are bound to follow the ruling of its highest state court. Yet, after doing so, they will be adjudged wrong by the federal courts. Quite simply, without a definitive resolution from this Court, the state of the law in this important constitutional field will be confused and chaotic.

Further, the Second Circuit decision frustrates the will of Congress as expressed in AEDPA. *See Williams v. Taylor*, 529 U.S. 362, 386 (2000) (plurality opinion) ("[I]t seems clear that Congress [in enacting AEDPA] intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ."). Here, the Circuit's ruling only paid lip service to these provisions; it did not show proper deference to the New York Court of Appeals, and, instead, brought about the very mischief that AEDPA was designed to prevent.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT T. JOHNSON
District Attorney
Bronx County
Counsel for Petitioner
Counsel of Record

ANTHONY J. GIRESE
JOSEPH N. FERDENZI
RAFFAELINA GIANFRANCESCO
Assistant District Attorneys
Of Counsel

Appendix A
Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 25, 2001 Decided: August 30, 2001)

Docket No. 00-2447

GEORGE MORRIS,

Petitioner-Appellant,

—v.—

EDWARD REYNOLDS, Superintendent of Mohawk Correctional Facility,

Respondent-Appellee.

Before:

WALKER, *Chief Judge*,
OAKES, and PARKER, *Circuit Judges*.

Petitioner-appellant, George Morris ("petitioner"), appeals from an order of the United States District Court for the Southern District of New York (Marrero, J.), entered August 3, 2000, denying his petition for a writ of habeas corpus.

REVERSED and PETITION GRANTED.

GEORGIA J. HINDE, New York, NY, *for Appellant.*

RAFFAELINA GIANFRANCESCO, Assistant District Attorney, Bronx, NY (Robert T. Johnson, Bronx County District Attorney, Joseph N. Ferdenzi, Allen H. Saperstein, Assistant District Attorneys, Bronx, NY, on the brief), *for Appellee.*

PARKER, *Circuit Judge*:

Petitioner appeals from an order of the United States District Court for the Southern District of New York (Marrero, J.), entered August 3, 2000, denying his petition for a writ of habeas corpus. This appeal requires us to decide the following questions: (1) whether the Supreme Court has "clearly established" that jeopardy attaches upon a trial court's unconditional acceptance of a guilty plea to the lesser included offense in a two-count indictment, and therefore that the Double Jeopardy Clause bars subsequent prosecution (or reinstatement of the indictment) on a greater felony offense; (2) whether the New York Court of Appeals applied a rule that is "contrary to" this clearly established federal law in

denying petitioner's Article 78 petition; and (3) the subsidiary factual question of whether the greater offense—felony possession of a weapon—was in fact "pending" when the defendant pled guilty to the lesser included misdemeanor offense of criminal possession of a weapon in the fourth degree.

Petitioner is currently serving an indeterminate term of imprisonment of from two and one-half to five years for Criminal Possession of a Weapon in the Third Degree pursuant to New York Penal Law ("NYPL") § 265.02, a class "D" felony. *See* NYPL § 70.02(c). Petitioner was charged in New York State court in a two-count indictment with third degree felony possession of a weapon (not in a person's home or place of business) and a lesser included count of fourth degree misdemeanor weapon possession, pursuant to New York Penal Law §§ 265.02 and 265.01, respectively. On June 4, 1997, Morris pleaded guilty to the felony charge. The trial court had initially accepted, with no objection from the prosecution, petitioner's guilty plea to the misdemeanor offense. However, under somewhat complicated factual circumstances detailed more fully below, the trial court, over defense objection, reinstated the felony count and declined to impose the bargained for sentence on the misdemeanor. Petitioner now contends that the New York trial court violated his rights under the Double Jeopardy Clause when it improperly reinstated the felony weapon possession count after accepting his guilty plea to the lesser included offense of misdemeanor weapon possession, when the misdemeanor was the only charge then pending against him. *See* U.S. Const. amend V, cl. 2 ("the Double Jeopardy Clause").

Respondent-appellee, Edward Reynolds, Superintendent of the Mohawk Correctional Facility ("respondent"), counters that the United States Supreme Court has yet to decide whether the Double Jeopardy Clause is violated when a court,

sua sponte, vacates a guilty plea to a lesser charge to correct its own error prior to sentencing.[1] Respondent also contends the Court has not decided when jeopardy attaches to a guilty plea. Therefore, according to respondent, petitioner fails to establish that the New York Court of Appeals's decision is contrary to or involves an unreasonable application of clearly established Supreme Court precedent as required for habeas relief under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) (1996).

The New York Court of Appeals denied petitioner's double jeopardy claim, though it did not discuss the claim or cite appropriate federal law. The Court of Appeals grounded its decision on its own prior precedent which holds that a trial court has the inherent power to vacate a plea, to correct its own errors, and conduct a subsequent prosecution on the original charges, and that as long as sentence has not been imposed and judgment entered, defendant's constitutional right not to be twice put in jeopardy does not bar the second prosecution.

We disagree with respondent for the reasons set forth below and therefore reverse the judgment of the district court, and grant the petition. Since the time petitioner has spent incarcerated already has exceeded the maximum penalty for the misdemeanor fourth degree weapons charge, *see* NYPL § 70.15(1), we order the petitioner immediately released from state confinement.

---

[1] This is a slight misstatement of the issue by the prosecution. The record does not indicate that the trial court actually vacated the plea. What it did do, however, is to reinstate the felony charge and refuse to sentence on the misdemeanor. Petitioner then instituted an Article 78 proceeding to prohibit vacatur of his plea. The Court of Appeals indicated the trial court could vacate the plea to a lesser charge and reinstate the felony as part of its power to correct its error.

I. BACKGROUND

A. *Facts and State Court Proceedings*

Petitioner was indicted in December 1993 on a class D felony count of Criminal Possession of a Weapon in the Third Degree and a class A misdemeanor count of Criminal Possession of a Weapon in the Fourth Degree. *See Morris v. Reynolds*, 107 F. Supp. 2d 421, 423 (S.D.N.Y. 2000). He moved to dismiss the indictment for legal insufficiency of the Grand Jury evidence. *See id.* The state opposed in a written response dated March 24, 1994. *See id.* On May 10, 1994, the trial justice ruled from the bench that the felony charge was dismissed. The government made no objection. The case was continued to June 7, 1994.

Morris contends that we should grant habeas relief because the Supreme Court has "clearly established" that when a defendant pleads guilty to a lesser included offense, and no other charge remains "pending" against him, once the court accepts his guilty plea and the prosecution does not object, to reinstate the greater count violates the Double Jeopardy Clause. The crucial factual issue on this theory therefore is whether the felony count remained "pending" when the court accepted Morris's plea to the misdemeanor. If it was "pending" at that time, then Morris only resolved a portion of the charges against him, and the court was within its power to reinstate the felony without violating the Double Jeopardy Clause under *Ohio v. Johnson*, 467 U.S. 493 (1984). If, however, the court actually dismissed the felony charge, then the court was without power to reinstate that charge after having accepted Morris's plea to a lesser included offense. We address the factual issue first, because if the greater offense remained "pending," then under *Ohio v. Johnson*, the petitioner's claim necessarily fails. A careful analysis of the record demonstrates, however, that this felony charge had

been dismissed, on the record, at the time the court accepted the petitioner's guilty plea.

On June 7, 1994, the trial court, reading from an index card, said that the people had not established sufficiently the home and business exception, and that the felony count was therefore dismissed.[2] The government made no objection. Additionally, the government informed the court that it was ready to proceed on the basis of the misdemeanor count and would need approximately three days to get its witnesses in. The case was continued to August 1, 1994.

On August 1, 1994, the court reiterated that the only count pending was criminal possession of a weapon in the fourth degree. The court indicated its willingness, "based on the paucity" of petitioner's record, to accept a plea to that charge and give petitioner a misdemeanor probationary sentence. The government did not object.

The court asked the petitioner if "[he] wish[ed] to change [his] plea from not guilty of the *remaining* count, criminal possession of a weapon in the fourth degree, to guilty of that crime?" App. at 16 (emphasis added). Petitioner responded yes. Defense counsel stated that petitioner was pleading guilty to the misdemeanor, in full satisfaction of the indictment. The government did not object.

The court carefully allocuted the petitioner. The government articulated the facts that it would have proven had the case gone to trial. The prosecution acknowledged that it understood that petitioner was to receive a probationary sentence of three years, and reserved its right to make a sentencing recommendation. The court accepted petitioner's plea and the prosecutor made no objection.

---

[2] The felony criminal possession of a weapon statute contains an exception for weapons possessed in a home or business.

There is some dispute over the timing—namely, whether the trial justice reinstated the felony count before the defendant pled guilty to the misdemeanor. According to the district court, immediately after the August 1, 1994 plea allocution the prosecutor asked the trial justice's law secretary for a copy of the trial justice's decision regarding the felony count and was informed "that it was 'not yet completed' but that it would find the grand jury proceedings sufficient to *reinstate* the felony indictment." *Morris*, 107 F. Supp. 2d at 435 (quoting Gianfrancesco Aff., Ex. 2) (emphasis added). According to the prosecutor, several days later she received a written decision, dated July 29, 1994, that found that the evidence was legally sufficient to sustain the felony count. According to the Court of Appeals, sometime after August 1, 1994, the trial justice filed a written decision dated July 29, 1994. *See Van Leer-Greenberg ex rel. Morris v. Massaro*, 87 N.Y.2d 996, 997, 665 N.E.2d 188, 188, 642 N.Y.S.2d 618, 618 (1996). Because the Court of Appeals did not expressly focus on the importance of the date on which the felony charge was dismissed, its decision leaves ambiguous whether it believed that order was back-dated.

Several months after the court accepted Morris's plea, on October 21, 1994 when preparing to sentence him, the trial justice stated that "after review, Criminal Possession of a Weapon in the Third Degree is *reinstated*." App. at 29 (emphasis added). The trial court offered petitioner the opportunity to withdraw the misdemeanor plea, which offer was declined. Petitioner brought an Article 78 proceeding seeking to prohibit the trial judge from setting aside the misdemeanor plea and seeking to require the court to impose the promised probationary sentence and to set aside the reinstatement of the felony. The Appellate Division granted his petition with two judges dissenting. *See Van Leer-Greenberg ex rel Morris v. Massaro*, 215 A.D.2d 283, 626 N.Y.S.2d 779

(1st Dep't 1995). The state appealed to the Court of Appeals which reversed and dismissed petitioner's Article 78 proceeding. *See Van Leer-Greenberg*, 87 N.Y.2d at 996, 665 N.E.2d at 188, 642 N.Y.S.2d at 618. On June 4, 1997, petitioner pleaded guilty to Criminal Possession of a Weapon in the Third Degree[3] and was sentenced to two and a half to five years imprisonment. He is currently incarcerated.

B. *Federal Court Proceedings*[4]

Petitioner filed an amended habeas petition, dated May 21, 1999, claiming that the trial court lacked the authority to set aside sua sponte the guilty plea and reinstate the felony count without petitioner's consent, and that this vacatur offended the Double Jeopardy Clause of the United States Constitution.

In a Report and Recommendation dated December 16, 1999, United States Magistrate Judge Peck recommended that the petition be granted. *Morris v. Reynolds*, No. 98 Civ. 5439 NRB AJP, 1999 WL 1565179, at *1 (S.D.N.Y. Dec. 16, 1999). Although he found that petitioner's claim regarding the trial court's lack of inherent authority to reinstate the indictment raised a question of state law that could not be addressed on federal habeas review, he concluded that petitioner's double jeopardy rights had been violated. *See id.* at *7, 14. After finding that the state courts had not adjudicated the merits of the federal constitutional issue, Magistrate Judge Peck determined that the AEDPA standard of review[5]

---

[3] We note that because the parties do not make waiver arguments, we do not address the issue of whether petitioner's plea constituted a waiver.

[4] Exhaustion of the legal and factual claims in state court is not an issue. *See Morris*, 107 F. Supp. 2d at 427.

[5] The AEDPA standard of review is:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

did not apply to this case and conducted a de novo review of the double jeopardy claim. *See id.* at *7-8.

After concluding that the Supreme Court had never directly addressed the issue of whether jeopardy attaches upon a court's unconditional acceptance of a guilty plea, the Magistrate Judge determined that in *Ohio v. Johnson*, 467 U.S. 493 (1984), the Supreme Court required lower courts to assess both the defendant's interest in finality and the state's interest in having one full and fair opportunity to convict. *See* 1999 WL 1565179, at *9-15. Based on this analysis, Magistrate Judge Peck concluded that reinstatement of the felony charge was barred by principles of double jeopardy and recommended granting the petition. *See id.* at *15.

In an order dated August 3, 2000, United States District Judge Victor Marrero declined to adopt the Magistrate Judge's report and denied the petition. *See Morris*, 107 F. Supp. 2d at 421. The district court found that the state courts did not examine the issues of the trial court's power to vacate a guilty plea and double jeopardy separately, reasoning that the two inquiries were inextricably intertwined and concluding that once the premise is accepted that the trial court's inherent authority under state law to correct its error was properly exercised, the double jeopardy issue was necessarily resolved. *See id.* at 430-432. Otherwise, reasoned the district court, the two legal conclusions would clash irreconcilably. *See id.* at 432. Consequently, the district court concluded that

---

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

the merits of the constitutional claim were adjudicated, and therefore the deferential AEDPA standard of review applied. *See id.* at 434.

With respect to the facts, the district court disagreed with the magistrate judge's conclusion that the trial justice had produced a 'back-dated written order, which despite its date clearly was not prepared until after the guilty plea was accepted.' *Id.* at 435 (quoting 1999 WL 1565179, at *14 n.8.). According to the district court, the magistrate judge's finding that the order was back-dated did not give proper deference to the factual findings of the state courts under 28 U.S.C. § 2254(e)(1).[6] *Id.* at 434.

The district court found that the inference drawn by the magistrate judge "was not based on a factual basis sufficient to support a convincing conclusion." *Id.* at 435. Therefore, the district court held, it was "constrained not to disturb the state court's factual findings" because petitioner "failed to show by clear and convincing evidence that those findings were erroneous." *Id.*

Regarding the law, the district court agreed with the magistrate judge's conclusion that the Supreme Court has not specifically addressed the issue related to double jeopardy in this case—whether jeopardy attaches at the time of the acceptance of a guilty plea. *Id.* The district court did, however, note that the decision of the Court of Appeals implicitly rested on the premise, discussed in the Appellate Division dissent, that no double jeopardy issue arose when the felony count was reinstated because the proceeding did not termi-

---

6 In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

nate in a judgment, i.e. conviction and sentence, but rather, merely a conviction pursuant to a guilty plea. *See id.* at 434-35 (citations omitted). The district court concluded that though there was no explicit mention of the federal double jeopardy claim, the New York Court of Appeals was following *Johnson*. *See id.* at 435.

Finally, the district court found that even under de novo review, using the rule that the magistrate judge derived from *Johnson*, i.e. whether the state had the opportunity to marshal its evidence and resources and chose not to exercise it, the writ should not issue. *See id.* at 436-38. The district court found that the magistrate judge's findings that the state never objected to the dismissal of the felony charges or Morris's guilty plea were not sufficiently supported by the record. *See id.* at 438. The district court issued a certificate of appealability on August 3, 2000. *See id.* at 439.

II. DISCUSSION

A. *Standard of Review*

This Court reviews de novo the district court's decision to grant or deny a petition for writ of habeas corpus. *See Clark v. Stinson*, 214 F.3d 315, 319 (2d Cir. 2000). We review a district court's factual findings for clear error. *See Amadeo v. Zant*, 486 U.S. 214, 223 (1988). This Court's review is, however, constrained by 28 U.S.C. § 2254, which provides that "a determination of a factual issue made by a state court shall be presumed to be correct;" however, the petitioner may rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Additionally, as acknowledged earlier a writ of habeas corpus may not issue "with respect to any claim that was adjudicated on the merits in State court proceeding unless the

adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Notwithstanding the absence of discussion of Morris's federal double jeopardy claim, the Court of Appeals's decision constituted an "adjudicat[ion] on the merits" to which we owe AEDPA deference. *See* 28 U.S.C. § 2254(d); *Sellan v. Kuhlman*, No. 99-2632, 2001 WL 909323 (2d Cir. Aug. 14, 2001). We determine:

> whether a state court's disposition of a petitioner's claim is on the merits by considering: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state courts' opinions suggest reliance upon procedural grounds rather than a determination on the merits.

Sellan, 2001 WL 909323 at *8 (quoting *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999)).

Pursuant to that test the New York Court of Appeals adjudicated *Morris* on the merits. First, New York courts have held in other cases that in similar circumstances, the Double Jeopardy Clause is not offended by a proceeding that does not terminate in judgment. *See Van Leer-Greenberg*, 87 N.Y.2d at 997, 665 N.E.2d at 189, 642 N.Y.S.2d at 619 (collecting cases). Second, the history of *Morris* does not suggest that the Court of Appeals was aware of any ground by which it could have decided the case without adjudicating it on the merits. *See id.* Indeed, the two justices of the Appellate Division that dissented did so on the ground that the Double Jeopardy Clause was not offended. *See Van Leer-Greenberg*, 215 A.D.2d at 286, 626 N.Y.S.2d at 782. Third, the Court of

Appeals's opinion does not rely upon procedural grounds for a determination. *See* 87 N.Y.2d at 997, 665 N.E.2d at 189, 642 N.Y.S.2d at 619. Because Morris's double jeopardy claim was therefore adjudicated on the merits, the district court correctly found that 2254(d) deference is due the state court decision.

Therefore, this Court is constrained to apply "clearly established Federal law," as determined by the holdings, not dicta, of the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "[W]hatever would qualify as an old rule under [the Supreme Court's] *Teague*[7] jurisprudence [ ] constitute[s] 'clearly established Federal law, as determined by the Supreme Court of the United States' under 2254(d)(1)." *Id.* (citation omitted). This Court must, however, be mindful that '*even on habeas, [it has] an independent obligation to say what the law is.*' *Id.* at 411 (quoting *Wright v. West*, 505 U.S. 277, 305 (1992)) (emphasis added).

The question for this Court then is whether under the circumstances of this case, the state court's decision to permit prosecution of petitioner on the reinstated felony charge was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

If we determine that petitioner is relying upon double jeopardy law which was clearly established federal law at the time of his prosecution, within the meaning of 2254(d), this

---

[7] *Teague v. Lane*, 489 U.S. 288 (1989). Prior to the passage of AEDPA, the Supreme Court's jurisprudence under *Teague* and its subsequent decisions dictated that when a prisoner sought federal habeas relief based upon a principle announced after a final judgment, federal courts were required to look at whether the state court's decision relied on an "old rule," i.e. a rule "dictated by precedent existing at the time the defendant's conviction became final," or whether it imposed a "new rule," i.e. one "[t]hat 'breaks new ground or imposes a new obligation on the States or the Federal Government.' " *Williams*, 529 U.S. at 380 (quoting *Teague*, 489 U.S. at 301).

Court must examine the state court decision and, guided by *Williams*, determine whether it is contrary to or an unreasonable application of that law.

B. *The Facts on Review*

As noted earlier, in a habeas proceeding, "a determination of a factual issue made by a state court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). "[P]etitioner, however, may rebut the presumption by clear and convincing evidence." *Morris*, 107 F. Supp. 2d at 427 (citing *Pons v. Artuz*, 00 Civ. 2004, 2000 WL 777942, at *2 (2d Cir. June 14, 2000)). Thus, this Court must presume that the factual findings of the New York courts are correct and may not set aside those findings unless "the material facts were not adequately developed at the state court hearing or the court's factual determinations are not fairly supported by the record." *Id.* at 427 (citation omitted).

The record in this case establishes that: (1) although the trial court's order reinstating the felony was dated July 29, 1994, the felony charge was not pending at the time petitioner's plea was accepted on August 1, 1994; and (2) the government did not object to entry or acceptance of the misdemeanor plea in this case. To the extent the district court concluded otherwise, its findings were clearly erroneous. Additionally, we think that the district court's observation that on the day petitioner's plea was accepted the trial court "contemplated a reversal of its earlier oral ruling," *id.* at 435, is of no import. Rather, the relevant inquiry is whether the felony count was pending at the time the court accepted the petitioner's plea.

The state conducted no formal fact-finding hearing. However, the trial court said, on October 21, 1994, that "[o]n July 29, 1994, [it] issued its written decision." App. at 34. The record belies this finding. Clear and convincing evidence

rebuts the trial court's statement. First, it is very clear that no one in court, including the justice, had any idea that the court did not dismiss the felony count and that the felony charge was pending at the time of the plea. Twice previously, the court had said it was dismissing the felony. On May 10, 1994, the trial justice ruled from the bench that he was dismissing the felony count of the indictment. *See* App. at 8. On June 7, 1994, he reiterated that ruling, *see* App. at 10, and on at least one of those dates he stated that the indictment was being dismissed because the "people failed to establish sufficiently the home and business exception." App. at 30. Directly before accepting petitioner's plea, the trial justice said, "The only count here is criminal possession of a weapon in the fourth degree." App. at 15. Defense counsel stated that her client wished to plead guilty to the misdemeanor, "in full satisfaction of [the] indictment." App. at 16. The trial justice then asked petitioner if he wished to plead guilty to the "*remaining* count, criminal possession of a weapon in the fourth degree," *id.* (emphasis added), to which petitioner responded "yes." *Id.* In addition, on August 1, 1994, the trial justice asked the prosecutor whether it was the People's understanding that the court intended to do away with the felony charge. *See* App. at 25. She responded "yes" and reserved only a "right to make a sentencing recommendation for the date of sentence." *Id.* Further, immediately following the plea, when the prosecutor asked the trial justice's law secretary for a copy of the decision it was not available because it was incomplete. *Morris*, 107 F. Supp. 2d at 437 (citation omitted). Finally, it was not until October 21, 1994 that the trial justice announced that "criminal possession of a weapon in the third degree is *reinstated*." App. at 29 (emphasis added). The record establishes beyond doubt that the felony charge was not pending on August 1, 1994 when the trial justice accepted petitioner's guilty plea to the mis-

demeanor, despite the fact that the decision reinstating the charge was dated July 29, 1994.

Because it was not material to the Court of Appeals' analysis, that court left ambiguous whether the felony count remained pending at the time of the plea, and whether it believed the written decision dated July 29, was back-dated. To the extent that the Court of Appeals left its findings on this fact, which we find determinative, ambiguous, our review of the record demonstrates by clear and convincing evidence that the felony count had been dismissed, and was therefore not pending, when the trial court accepted Morris's plea.

Further, the transcript is quite clear: at no time during the plea allocution did the prosecutor object to the plea. *See* App. at 13-27. The prosecutor claims to have protested the fact that no written decision (presumably of the felony dismissal) was available—"off the record." App. at 98. We have no way of assessing the claim. Nothing in the record suggests any disagreement with entry of the plea. *See* App. at 13-27. The record reflects only what we set forth earlier, viz. the prosecutor understood that the court intended to do away with the felony count and reserved her right to make a sentencing recommendation. *See* App. at 25. Thus, the record supports a finding that the trial justice accepted Morris's guilty plea to the misdemeanor with the prosecutor's approval or at least without objection by the prosecution.[8]

C. *The Law*

The Supreme Court has clearly established, for the purpose of 28 U.S.C. § 2254(d), that when no greater offense remains "pending" at the time a court accepts a defendant's guilty

[8] We do not disagree with the district court's finding that the prosecutor earlier objected to the dismissal of the felony charge. *See Morris*, 107 F. Supp. 2d at 438.

plea to a lesser included offense, and the prosecution has not objected to the defendant's plea, the Double Jeopardy Clause bars reinstatement of the greater offense.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V, cl. 2. "It protects against a second prosecution for the same offense after acquittal. *It protects against a second prosecution for the same offense after conviction.* And it protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (citing *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969))) (emphasis added). The provision "serves principally as a restraint on courts and prosecutors." *Brown*, 432 U.S. at 165. "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.'" *Id.* (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)).

The Supreme Court has long held that a guilty plea constitutes a conviction. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927). In *Kercheval*, the government charged defendant with using the mails to defraud. *See id.* at 221. Defendant pleaded guilty and the court sentenced him to a term of imprisonment of three years. *See id.* Upon defendant's motion the court allowed the defendant to withdraw his guilty plea. *See id.* at 221-22. At the trial the court permitted the prosecution, over defendant's objection, to put in evidence a certified copy of the guilty plea. *See id.* at 222. On appeal the government argued that a guilty plea is similar to a confession, and therefore should be likewise admitted. *See id.* at 223. The Supreme Court held that a guilty plea differs in purpose and effect from a confession; "it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment

and sentence." *Id.* at 223. Given that a guilty plea is a conviction, *see id.*, and that the Double Jeopardy Clause "protects against a second prosecution for the same offense after conviction," *Johnson*, 467 U.S. at 498 (citation and internal quotation marks omitted), the Clause prohibits a second prosecution for the same offense following a guilty plea.

It has also long been clearly established by the Supreme Court that it is a violation of double jeopardy to prosecute a defendant for a greater offense after convicting and punishing the defendant for a lesser included offense. *See Brown*, 432 U.S. at 168. In *Brown*, the defendant pleaded guilty to joyriding, the crime of operating a vehicle without the owner's consent. 432 U.S. at 162. After he completed his 30 day jail sentence, he was indicted for theft of the same car (however, on a different day), a greater offense which under Ohio law includes the misdemeanor of joyriding. *Id.* at 162-63. Applying the *Blockburger* test, the Court determined that "for purposes of barring successive prosecutions" a greater offense is the same offense as a lesser included offense. *See id.* at 166 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). In *Brown*, of course the trial court not only convicted the defendant of the lesser included offense, it also punished him for that offense prior to prosecution for the greater offense. The Court was clear in *Brown*, and subsequently in *Johnson*, however, that the double jeopardy bar prohibits not only multiple punishments for the same offense, but also a second prosecution following conviction, regardless of whether sentencing has taken place. "Previously we have recognized that the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense." *Johnson*, 467 U.S. at 501 (citing *Brown*, 432 U.S. at 161). We therefore conclude that the Supreme Court has established that, after a court accepts defendant's

guilty plea to a lesser included offense, prosecution for the greater offense violates the Double Jeopardy Clause. Thus, a trial court may not sua sponte reinstate a dismissed felony following acceptance of a guilty plea to a lesser offense. Nor may it sua sponte vacate the defendant's plea in order to reinstate the greater offense.

In contrast, the Double Jeopardy Clause is not offended when the greater offenses charged in the indictment remain "pending" at the time of a guilty plea, and when the prosecution objects to the plea to a lesser included offense. *Johnson*, 467 U.S. at 500-502. In *Ohio v. Johnson*, greater and lesser included offenses were pending against the defendant. 467 U.S. at 496. Over the prosecutor's objection the trial court accepted guilty pleas to the lesser offenses and granted defendant's motion to dismiss the remaining more serious charges holding that further prosecution was barred by the Double Jeopardy Clause. *See id.* Then Justice Rehnquist, writing for the Court in *Johnson*, distinguished *Johnson* from *Brown* by noting that the principle of finality implicated in *Brown* was not present in *Johnson* since Johnson "offered only to resolve part of the charges against him, while the State objected to disposing of any of the counts against respondent without a trial." 467 U.S. at 501. Thus, the state's further prosecution did not infringe Johnson's interest in repose because he did not dispose of the entire case by entry of his plea.

Accordingly, a rule that the state may not prosecute a defendant for a greater offense after his conviction pursuant to a guilty plea of the lesser included offense does not "break[ ] new ground or impose[ ] a new obligation on the states." *Vasquez v. Strack*, 228 F.3d 143, 148-49 (2d Cir. 2000) (alterations in original). Thus, the only question is whether the felony charge was "pending" when Morris pled guilty to the misdemeanor. It was not. Morris resolved the

only charge pending against him at the time his plea was accepted. He did not attempt to use double jeopardy "as a sword to prevent the State from completing its prosecution on the *remaining charges*." *Johnson*, 467 U.S. at 502 (emphasis added). There were no remaining charges. Consequently, similar to the defendant in *Brown*, the subsequent prosecution infringed Morris's interest in repose which the Double Jeopardy Clause protects.

Further, although we agree that a court has the power to correct its own errors, when the correction of those errors infringes a defendant's rights under the Double Jeopardy Clause to finality and repose, the power to correct mistakes must cede ground. The court in *Johnson* erred in accepting defendant's guilty plea to the lesser included charges while the greater charges remained pending, and the prosecution objected to the entry of the plea. However, because the defendant had no interest in finality, since he offered to resolve only part of the charges against him, the Double Jeopardy Clause did not restrain the correction of that error.

Here, however, as in *Brown*, petitioner had an interest in finality because he had resolved all of the charges pending against him. Under the circumstances, the Double Jeopardy Clause acts to restrain the trial court from correcting any error.

Thus, we conclude that under *Kercheval*, *Brown*, and *Johnson*, which constitute "clearly established Federal law," the second prosecution violated petitioner's rights under the Double Jeopardy Clause.

We must now analyze the substance of the state court decision to determine whether it is contrary to or an unreasonable application of this clearly established federal law.

E. *The State Court Decision*

We conclude that the New York Court of Appeals applied the following rule in reaching its decision to reject Morris's Double Jeopardy claim: *The double jeopardy bar does not arise until after conviction and imposition of sentence because "trial courts in criminal cases have the general inherent authority to correct their own mistakes," prior to sentencing. See Van Leer-Greenberg*, 87 N.Y.2d at 998, 665 N.E.2d at 189, 642 N.Y.S.2d at 619 (citations omitted). Though the Court did not explicitly address Morris's double jeopardy claim, its holding necessarily implied that the double jeopardy bar does not arise until imposition of sentence and that the trial court lawfully exercised its authority to correct a mistake in this case without violating the Double Jeopardy Clause. The Court cited several state court decisions for this proposition.

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor speaking for the Court in Part II of her concurrence set forth that a state court decision will be "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* at 405. The *Van Leer-Greenberg* rule as necessarily applied by the Court of Appeals in this case "contradicts the governing law" established by Supreme Court precedent, which holds, as we have shown above, that the double jeopardy bar arises, after a conviction but before sentencing, when a defendant pleads guilty to a lesser included offense, the prosecution did not object to the plea, and there was no greater offense pending at the time the plea was accepted. Consequently, petitioner's application for relief falls within the constraints of § 2254(d)(1), and we therefore grant the petition for writ of habeas corpus.

III. CONCLUSION

For the reasons set forth above, we reverse the decision of the district court and grant the petition for a writ of habeas corpus. Since the time petitioner has spent incarcerated already has exceeded the maximum penalty for the misdemeanor fourth degree weapons charge, we remand to the district court for entry of an order that the petitioner be immediately released from state confinement.

Appendix B
***Morris v. Reynolds*, 107 F.Supp.2d 299 (S.D.N.Y. 2000)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 5439 (VM)

GEORGE MORRIS,

Petitioner,

-against-

EDWARD REYNOLDS, Superintendent of Mohawk Correctional Facility,

Respondent.

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

George Morris ("Morris" or "Petitioner") petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In support, Morris alleges that after he had entered a plea of guilty to a misdemeanor charge on which he was indicted, a state trial court judge improperly reinstated a previously dismissed felony count in the same indictment. Morris argues that such reinstatement violated his constitutional right under the Fifth Amendment of the United States Constitution not to be twice put in jeopardy. The Magistrate Judge, to whom the petition was referred, issued a Report and Recommendation advising that the habeas petition be granted and that Morris be released from state custody. For the reasons set forth below, the Court declines to accept the Report and Recommendation and denies the petition.

FACTS[1]

Morris was indicted on December 9, 1993 for criminal possession of a weapon in the third degree (a Class D felony) and the lesser included offense of criminal possession of a weapon in the fourth degree (a Class A misdemeanor) for carrying a loaded pistol on November 9, 1993. On March 4, 1994, Petitioner moved to dismiss the indictment for insufficient evidence. The State opposed the motion in a written response dated March 24, 1994. Justice Dominic Massaro of the New York State Supreme Court, Bronx County (the "Trial Justice"), orally dismissed the felony count at a calendar call on May 10, 1994.

During a conference held on the June 7, 1994, the Trial Justice acknowledged that he had previously dismissed the felony count. Asked by Morris's counsel for a copy of the written decision on Morris's motion, the Trial Justice replied that a copy could be obtained from the court's clerk and that there "probably" was one in the file. See Transcript from Hearing in People v. Morris, dated June 7, 1994, at 2-3; Affidavit of Raffaelina Gianfrancesco in Opposition, dated July 20, 1999 ("Gianfrancesco Aff."), Ex. 2.

Morris was scheduled to plead to the misdemeanor charge on August 1, 1994. Before his plea was taken, the prosecutor asked the Trial Justice for a copy of the written decision concerning the felony count and was told that she should have gotten a copy of it sooner. See Gianfrancesco Aff., Ex. 2. On that day, over the prosecutor's protest that there was no written decision dismissing

---

[1] The facts described herein are taken from the records submitted in connection with Morris's petition.

the felony count (see Gianfrancesco Aff., Ex. 2), the Trial Justice allowed Morris to withdraw his earlier plea of not guilty and to enter a plea of guilty to the misdemeanor charge, which the Trial Justice characterized as the "remaining count." See Transcript from Hearing in People v. Morris, dated August 1, 1994, at 14. After allocution, the Trial Justice accepted the plea, indicating that he would impose a sentence of three years' probation. See id. at 12. The prosecutor averred that "[d]irectly after the plea was taken." (see Gianfrancesco Aff., Ex. 2), she called the Trial Justice's Law Secretary to request a copy of the Trial Justice's written decision and was informed that the decision was not "completed" but that it would reflect that the Trial Justice had found the evidence before the grand jury sufficient to sustain the indictment. See id.

"Several days later," the prosecutor received a copy of that decision. See id. The Trial Justice's written decision, which was dated July 29, 1994 (the "Decision"), formally denied Morris's motion to dismiss the felony count. The Decision found that the "credible evidence educed from the Grand Jury is legally sufficient to sustain the indictment." Id., Ex. 3.

During Morris's sentencing on October 21, 1994, the Trial Justice orally confirmed his reinstatement of the felony count, asserting that the previous dismissal was issued in error:

> After review, [the felony count] is reinstated. I will afford the gentleman the opportunity to withdraw his plea, which was obviously made under the impression that that had been reduced -- I mean, dismissed.
>
> ...

> On July 29th, 1994, the Court issued its written decision, Court [sic] having pointed out that the dismissal of Criminal Possession of a Weapon in the Third Degree previously enunciated from the Bench on 5/10, ma'am, I believe not 6/7, but in any event was incorrect. When the matter was reduced to the written decision, the Court realizing it's [sic] own error, corrected itself. And having done so, any Bench decision rendered either on 5/10 or 6/7 is withdrawn and the decision of July 29th, 1994 stands.

Transcript from Hearing in People v. Morris, dated October 21, 1994 ("Oct. Tr."), at 2, 7-8. The Trial Justice offered to allow Morris to withdraw his plea to the misdemeanor charge, which the court acknowledged had been made under the impression that the felony count had been dismissed. See id. Morris refused. The Trial Justice then, over Morris's objection, vacated the misdemeanor plea.

PROCEDURAL HISTORY

In December 1994, Morris filed a petition for prohibition with the Appellate Division, First Department, under Article 78 of New York's Civil Practice Law and Rules ("C.P.L.R.") seeking to prohibit the Trial Justice from carrying out his decision to vacate Morris's misdemeanor guilty plea and reinstate the felony count, and also to compel the Trial Justice to sentence him to three years probation, in accordance with the terms of Morris's August 1, 1994 misdemeanor plea. As Respondents, Morris's appeal named the Trial Justice and the Bronx County District Attorney. The petition advanced two arguments: that (1) the Trial Justice had no authority, sua sponte and unilaterally without Petitioner's consent, to

vacate the earlier plea and reinstate the previously dismissed felony count, absent some impropriety associated with the taking of the plea (see Verified Petition, dated Dec. 6, 1994 ("Verified Petition"), ¶¶19, 22[2]); and (2) the reinstatement of the felony count violated Morris's double jeopardy rights under the United States Constitution. See id., ¶22.

The Appellate Division granted Morris's petition, with two Justices dissenting. See Van Leer-Greenberg *ex rel.* Morris v. Massaro, 626 N.Y.S.2d 779 (1st Dep't 1995). The majority found that no statutory authority existed permitting the Trial Justice to vacate a guilty plea without the defendant's consent. See id. at 780. Moreover, the court found that despite the Trial Justice's attempted reinstatement of the felony count, because prior agreement on a plea to the lesser charge had been reached and there was no change in circumstances, Morris was entitled to the benefit of his plea bargain. See id.

The dissent argued that since the Trial Justice "ruled in error, he has the inherent power to vacate the plea, which would have been improper, prior to the imposition of sentence and to correct his own error and reinstate the previously dismissed charge." Id. at 781. Accordingly, the dissenters concluded that the Trial Justice merely exercised inherent authority to correct his error when he vacated the guilty plea and reinstated the felony count. See id. The dissent further maintained that since the trial court had the inherent power, prior to the imposition of sentence, to vacate an illegal or invalid plea and "restore the action to its pre-plea status," further proceedings

---

[2] The Verified Petition contains two paragraphs numbered "22." The reference here is to the first such numbered paragraph.

would not be barred by double jeopardy concerns. See id. at 782. In such circumstances, (a) vacatur of a guilty plea was not the equivalent of an acquittal based on an adjudication as to the factual elements of the charge, (see id.), and (b) the double jeopardy clause was not violated because the proceeding did not "terminate" in a "judgment" -- a conviction and the sentence imposed thereon -- but only in a "conviction" by virtue of a guilty plea. See id.

Shortly after its decision, the Appellate Division granted the Respondents leave to appeal to the New York Court of Appeals and certified a question, (see Van Leer-Greenberg *ex rel.* Morris v. Massaro, 628 N.Y.S.2d 1013 (1st Dep't 1995)), as provided for in the case of an appeal that may be taken by permission. The question presented to the Court of Appeals was whether the Appellate Division's decision and order entered on May 23, 1995 was properly made. See Objections to the Magistrate's Report and Recommendation, dated Jan. 20, 2000 (the "Objections"), Ex. 5.

A unanimous Court of Appeals declined to answer the certified question and reversed the judgment of the Appellate Division, holding that the Trial Justice had not acted improperly because a trial court has the inherent authority to correct its own error before imposition of sentence. See Van Leer-Greenberg *ex rel.* Morris v. Massaro, 665 N.E.2d 188, 189 (N.Y. 1996). On June 4, 1997, Morris entered a guilty plea to the felony count and was sentenced to between two-and-a-half and five years in prison. Morris did not appeal this conviction.

Morris filed with this Court in March 1998 a petition for a writ of habeas corpus which was later amended to remove unexhausted claims and refiled as the instant petition raising two points as grounds for relief. These

arguments were the same ones Morris had made in his state court appeal: that (1) absent impropriety in the taking of the plea, the Trial Justice lacked authority sua sponte and without Morris's consent to vacate Morris's plea and restore the previously dismissed felony charge and (2) the reinstatement of the felony count violated Morris's federal double jeopardy rights. See Amended Petition for a Writ of Habeas Corpus, dated May 21, 1999, at 3-4. The State's response to Morris's amended petition argued that Morris's first ground must be dismissed because it did not raise a federal constitutional issue (see Memorandum of Law in Opposition to Writ, dated July, 1999, at 13), and that Morris's rights under the Double Jeopardy Clause were not violated because the vacatur of a guilty plea was not the equivalent of an acquittal based on the adjudication of the factual elements of the charge. See id. at 16.

Counsel was appointed in August 1999 to represent Morris with regard to this petition. The Magistrate Judge issued a thorough, reasoned Report and Recommendation (the "Report") on December 16, 1999. With respect to Morris's first ground, the Magistrate Judge found that the argument raised a question of state law authoritatively answered by the New York Court of Appeals. See Report at 13. The analysis of the constitutional claim, however, yielded a conclusion that Morris's double jeopardy rights were violated, prompting a recommendation that Morris be released. See id. at 29-30. The Bronx County District Attorney, representing the State, filed objections to the Report. Morris submitted a response to the objections, urging that the Magistrate Judge's findings be upheld.

STANDARD OF REVIEW

A. Magistrate Judge's Report

The Federal Magistrate Act provides that a district judge may "designate a magistrate to conduct hearings, including evidentiary hearings" in order to "submit to a judge of the court proposed findings of fact and recommendations for the disposition . . . of applications for postrial relief made by individuals convicted of criminal offenses...." 28 U.S.C. § 636(b)(1)(B)(2000). In reviewing the Report, this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(2000); see Fed.R.Civ.P. 72(b). Any party may object to the Magistrate Judge's findings and recommendations. See id. If an objection is timely filed, as is the case here, the Court is bound to make a "de novo determination of those portions of the report . . . or recommendations to which objection is made." Id. See United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997).

B. Anti-Terrorism and Effective Death Penalty Act

As a preliminary matter, the Court notes that, because Morris's petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), this action is governed by the habeas statute as amended. See Williams v. Taylor, -- U.S. –, 120 S.Ct. 1495 (2000); 28 U.S.C. § 2254. Pursuant to the various sections of 28 U.S.C. § 2254, this Court's review is guided by certain restrictions on the nature and extent of review that a federal court can conduct in considering a habeas petition.

1. Exhaustion

A federal court may entertain a petition for a writ of habeas corpus only where the petitioner has first "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) (2000). See Picard v. Connor, 404 U.S. 270, 275 (1971); Caballero v. Keane, 42 F.3d 738, 740 (2d Cir. 1994); Daye v. Attorney General of New York, 696 F.2d 186, 190 (2d Cir. 1982). This requirement mandates a habeas petitioner to have "fairly presented" in state court the claims that are raised in the habeas petition. Picard, 404 U.S. at 275. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Strogov v. Attorney General of New York, 191 F.3d 188, 191 (2d Cir. 1999), cert. denied, -- U.S. --, 120 S.Ct. 2723 (2000); Gonzalez v. Sullivan, 934 F.2d 419, 422 (2d Cir. 1991). The petitioner must present both the factual and legal premises of his claims to the state court. See Daye, 696 F.2d at 191-92. In this case, the State has conceded that the two claims Morris raises in the instant petition were exhausted in state courts. See Gianfrancesco Aff., ¶ 19 n.1; Report at 12. The Magistrate Judge found that these claims were exhausted. See Report at 12. This Court finds sufficient support in the record to sustain the Magistrate Judge's finding in this regard. Accordingly, this Court concludes that Petitioner's claims have been exhausted.

2. Presumption of Correctness

In a habeas corpus proceeding, "a determination of a factual issue made by a state court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1) (2000). Petitioner, however, may rebut the presumption by clear and convincing evidence. See id.; Pons v. Artuz, 00 Civ. 2004, 2000 WL 777942, at *2 (2d Cir. June 14, 2000). Consequently, this Court presumes that the factual findings of the New York courts are correct and will not set aside those findings unless "'the material facts were not ade-

quately developed at the State court hearing' or the court's factual determinations are not fairly supported by the record." James v. Greiner, 99 Civ. 2513, 2000 WL 233696, at *1 (2d Cir. Feb. 16, 2000) (quoting Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999)). In this case, the Court concludes that deference should be accorded to the New York state courts' factual findings and pertinent elaborations. See discussion, infra.

3. The "Contrary to" and "Unreasonable Application" Prongs

Section 2254 of the AEDPA now provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1) (2000).

The United States Supreme Court recently decided the proper interpretation of section 2254(d)(1) and the manner in which a federal court is to consider the legal conclusions of a state court. See Williams, 120 S.Ct. 1495. The Court held that § 2254(d)(1) defines two categories of cases, each with *independent* meaning, in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. See id. at

1519. Parsing the explicit test of the statute, the Court stated that a federal court may grant a writ of habeas corpus if the state court decision is either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Id.

A state court's decision may be held contrary to clearly established Supreme Court precedent in either of two occasions: (1) "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's] precedent." Id. at 1519-20. Regarding the "unreasonable application" prong of section 2254(d)(1), the Court held that a state court decision involves an unreasonable application of its precedent "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 1523. The Court further commented that

> An unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1522. The relevant inquiry under this clause, therefore, is "whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521.

The Court further addressed the meaning of the phrase "clearly established Federal law." See id. at 1523. The phrase restricts the source of clearly established law solely to the Supreme Court's jurisprudence -- "the holdings, as opposed to dicta, of [the] Court's decisions as of the time of the relevant state-court decision." See id. Accordingly, this Court, sitting as a federal habeas court in reviewing Morris's petition, is guided by and restricted to applicable United States Supreme Court precedent.

As of the time the Magistrate Judge issued the Report, Williams had not been decided. The Magistrate Judge determined, however, that he "need not await the Supreme Court's decision . . . since the AEDPA review standard does not apply to this case, because no state court adjudicated the merits of the federal constitutional issue." Report at 15. Because this Court concludes that the New York state courts adjudicated Morris's double jeopardy claim, the Court finds that Williams does apply to this case.

THE MAGISTRATE JUDGE'S REPORT

The Magistrate Judge determined that Morris's first claim "raises a question of state law that was authoritatively answered in the negative by the New York Court of Appeals" and concluded that "[t]his Court has no power to disturb that finding." Report at 13. Regarding Morris's double jeopardy claim, the Magistrate Judge stressed that although both Morris and the State presented arguments concerning the double jeopardy issue

to the state courts, neither the First Department majority nor the Court of Appeals, expressly or impliedly, adjudicated the merits of the federal double jeopardy issue. See Report at 9, 10, 15, 17. Consequently, the Magistrate Judge engaged in a de novo review of Morris's double jeopardy claim. See Report at 15-17. Notwithstanding the Magistrate Judge's exhaustive effort and considered analysis, this Court is unable to sustain his findings in this regard. In some material ways, this Court's reading of the record differs from the Magistrate Judge's interpretation. The Court concludes that both the factual and legal premises of Morris's habeas claims were fairly presented to the New York state courts and that those courts adjudicated the merits of Morris's double jeopardy claim.

A. Article 78: Extraordinary Remedy and Double Jeopardy

The New York Court of Appeals has long held that prohibition is an "extraordinary remedy." State v. King, 324 N.E.2d 351, 353 (N.Y. 1975). Invocation of the remedy is appropriate "only when there is a clear legal right." Nicholson v. State Comm'n on Judicial Conduct, 409 N.E.2d 818, 821 (N.Y. 1980) (quoting Dondi v. Jones, 351 N.E.2d 650, 654 (N.Y. 1976)), and "solely to prevent or control a body or officer acting in a judicial or quasi-judicial capacity from proceeding or threatening to proceed without or in excess of its jurisdiction. . . ." Town of Huntington v. New York State Div. of Human Rights, 624 N.E.2d 678, 679 (N.Y. 1993) (quoting Schumer v. Holtzman, 454 N.E.2d 522, 524 (N.Y. 1983)).

Prohibition is not available to correct the common legal errors of litigation, whether procedural or substantive, no matter how egregious. See La Rocca v. Lane, 338 N.E.2d

606, 609 (N.Y. 1975), cert. denied, 424 U.S. 968 (1976). The orderly administration of justice requires that the correction of such errors be left to the ordinary channels of review upon appeal. See id. Prohibition, however, provides the means to prevent an arrogation of power in violation of a person's rights, particularly constitutional rights. See Nicholson, 409 N.E.2d at 821. A leading authority on New York practice has commented on the use of the prohibition proceeding to address such fundamental rights:

> Prohibition is an extraordinary remedy, available at best only as a matter of judicial discretion and not as a matter of right. Given an extraordinary showing, however, such as a potential violation of the double jeopardy rule . . . prohibition will issue to enjoin even a criminal action. While courts are naturally loath to restrain exercises of jurisdiction by another court, they will do so when the latter, by the very exercise, threatens fundamental constitutional rights.

David D. Siegel, New York Practice, § 559 (3d ed. 1999).

The New York Court of Appeals has further held that a proceeding in the nature of prohibition under Article 78 instituted under a theory that a defendant could not be twice placed in jeopardy for the same offense "is the traditional remedy designed for this kind of situation." Kraemer v. County Court of Suffolk County, 160 N.E.2d 633, 634 (N.Y. 1959). See N.Y. C.P.L.R. § 7801, Practice Commentary C7801:4 (McKinney 1994) (prohibition proceeding is appropriate in connection with a criminal prosecution in potential violation of double jeopardy). More recently, other New York state courts have confirmed that "an article 78 proceeding in the nature of

prohibition is an appropriate vehicle by which to raise the bar of double jeopardy against further criminal prosecution." Northrup v. Relin, 613 N.Y.S.2d 506, 508 (4th Dep't 1994), leave to appeal denied, 641 N.E.2d 158 (N.Y. 1994); Dickson v. Morgenthau, 476 N.Y.S.2d 841, 843 (1st Dep't 1984). See also Di Lorenzo v. Murtagh, 327 N.E.2d 805, 807 (N.Y. 1975) ("the extraordinary remedy of prohibition lies to review double jeopardy claims"); Accord Robinson v. Snyder, 686 N.Y.S.2d 392, 393 (1st Dep't 1999), leave to appeal denied, 716 N.E.2d 697 (N.Y. 1999).

In this case, Morris's double jeopardy claim goes to the very heart of his prohibition petition charging that the trial court had acted improperly. That allegation served as the basis for the Appellate Division's exercise of its discretion to grant permission to review Morris's Article 78 petition. Standing alone without the double jeopardy violation claim, Morris's Article 78 proceeding seeking prohibition may well have been insufficient to invoke the extraordinary remedy. In fact, Morris not only squarely presented his double jeopardy argument to the state courts, but expressed an unequivocal understanding that they considered and rejected his claim.

Morris confirmed in the proceeding before this Court that he "fairly presented his constitutional double jeopardy claim by means of a pretrial state procedure that . . . is the preferred method for testing whether continued prosecution should be permitted or prohibited as a violation of the double jeopardy guarantee." Response to Objections to Report and Recommendation, dated Feb. 2, 2000, at 6. Indeed, the Magistrate Judge acknowledged that Morris, in his Verified Petition, argued that there had been a violation of the double jeopardy clause. See Report at 7. Also compelling is Morris's own statement that "the state appellate court rejected his earlier attempt to avoid

this second conviction for the same offense conduct." See Memorandum in Support of Petition for a Writ of Habeas Corpus, dated Nov. 4, 1999, at 12 n.11. Moreover, in his Verified Petition filed with the Appellate Division, Morris argued that the Trial Justice's actions "mandat[ed] the instant relief sought via this proceeding, which violates the defendant MORRIS's double jeopardy rights under the Constitution of the United States" (Verified Petition, ¶ 22) and that Petitioner "will be irreparably harmed, injured and have his constitutional rights vitiated in the event that this Court fails to act. . . ." Id., ¶ 24.

For the purposes of this review, however, what matters is not so much Morris's perception concerning the state courts' consideration of his appeal, as the evidence of what the courts actually did. That both Morris and the Bronx District Attorney, on behalf of the State, confirm that the double jeopardy issue was fairly presented to the state courts is but one piece of important evidence for this purpose. The critical question, therefore, is whether, having been adequately presented with the issue, the state courts considered and adjudicated it. Though admittedly on a sparse record reasonably subject to varying inferences and different interpretations, this Court concludes that the state courts considered and adjudicated Morris's double jeopardy claim.

First, the very vehicle by which Morris's double jeopardy claim reached the Appellate Division -- the Article 78 proceeding -- provides persuasive evidence that Morris's double jeopardy issue was an inextricable part of the matter the appellate court considered. As discussed above, under well-established New York state law, the Article 78 proceeding is the appropriate and most expeditious vehicle for advancing a claim of potential violation of double jeopardy in New York courts. Morris's

Article 78 petition in this case, by its very nature, presented the merits of his double jeopardy claim to the Appellate Division. That claim is integrally linked with, and served as the foundation for, Morris's first claim that the Trial Justice lacked the authority to vacate the misdemeanor plea and reinstate the felony.

In this regard, this Court agrees with the District Attorney's assertion that "the *sine qua non* premise of the Article 78 proceeding was that the trial court's actions violated the double jeopardy clause." Objections at 7. Standing alone, the petition's first claim would have raised nothing more than an unremarkable proposition as to whether, over the defendant's objection, the trial court prior to sentencing could vacate a guilty plea to a misdemeanor or reinstate a felony charge previously dismissed by oral ruling. Arguably, either such issue by itself may not even have qualified for appellate review on a petition for prohibition. But the record suggests that the state appellate court review did not examine these questions in isolation. What gave Morris's claim its import and the immediacy that raised the question on appeal to the level of a constitutional issue eligible for review in an Article 78 prohibition proceeding was the combination and interrelatedness of these issues: the trial court's acceptance of Morris's misdemeanor plea while a formal decision on the sufficiency of the felony count was still pending, and its effort to correct the error by vacating the plea and reinstating the previously dismissed indictment.

In this context, the trial court's action was improper and considered error, as may be inferred from the reasoning of the Appellate Division's dissent, precisely because, had the mistake not been corrected, reinstatement of the felony indictment would have raised legitimate double jeopardy concerns. See Massaro, 626 N.Y.S.2d at 781. See

e.g., United States v. Dixon, 509 U.S. 688, 696 (1993); Brown v. Ohio, 432 U.S. 161, 169 (1977). The correction of the trial court's mistake, the proper authority for which is a matter of state law that this Court must accept in this proceeding, effectively removed the ground upon which Morris's double jeopardy claim properly could be rooted. It restored the action "to its pre-plea status." See id. Without the misdemeanor conviction in place, the reinstatement of the felony count would not implicate double jeopardy concerns. See Dixon, 509 U.S. at 696; Brown, 432 U.S. at 169.

A construction of these events with a reading of the state courts' opinions concluding that Morris's double jeopardy claim was not considered at either level of state appellate review, would rest on a fallacy that would render the entire state judicial proceedings in this case incoherent and meaningless. Under the facts here, for this Court to accept, as a matter of state law unreviewable here, that the trial court had inherent power to correct its own error and that to that end it was authorized to vacate Morris's misdemeanor plea on its own motion and restore a previously dismissed felony indictment, would clash irreconcilably with the legal conclusion that the trial court's decision taken to exercise that authority to correct such a mistake would then result in a violation of rights under the Double Jeopardy Clause. This Court has difficulty seeing how these two conclusions could stand side by side.

Once the premise is accepted that the trial court's inherent authority under state law to correct its error was properly exercised, the double jeopardy issue, which constituted an elemental reason for the trial court's error, must necessarily be resolved. This point explains why the Appellate Division majority had no reason to mention the

double jeopardy claim, having concluded, wrongly, that the trial court lacked authority to vacate Morris's misdemeanor plea. By the same token, it indicates why, to the contrary, the dissent undertook to address the issue, for its legal conclusion that the trial court did possess that inherent power would have been fatally flawed had the court at the same time not overcome the double jeopardy obstacle subsumed in the analysis of the question it considered. The Court of Appeals' adoption of the dissent's position would be incoherent without its incorporation of this premise.

Second, that the Trial Justice's appeal to the Court of Appeals was as of right, by virtue of a two-Justice dissent that explicitly addressed the double jeopardy issue, also supports a conclusion that the Court of Appeals had Morris's double jeopardy issue fairly presented to it. Third, Morris's double jeopardy claim was included in the papers and arguments made by both parties to the Court of Appeals. See Appellant's (Respondents herein) Brief to New York Court of Appeals, dated Oct. 1995, at 16; Respondent's (Petitioner herein) Brief to the Court of Appeals, dated Dec. 22, 1995, at 16, 19-20. Fourth, the Court of Appeals chose implicitly to resolve the double jeopardy issue by agreeing with the Appellate Division dissent that the Trial Justice had the inherent authority to correct himself. In support of this proposition, the Court of Appeals cited two of its own prior rulings, both of which concluded that a trial's court's exercise of its inherent authority to vacate a guilty plea did not violate the Double Jeopardy Clause. See People v. Minaya, 429 N.E.2d 1161 (N.Y. 1981); People v. Bartley, 393 N.E.2d 1029 (N.Y. 1979).

The Magistrate Judge's Report dismisses the District Attorney's argument that the mention of these cases in

this context represents an implicit finding of no double jeopardy violation in Morris's case. See Report at 16-17. The Report does so on the ground that the main focus of the issue discussed in the specific pages of these two decisions to which the Court of Appeals makes reference is the trial court's inherent power to vacate a guilty plea, rather than the double jeopardy question. See id. This Court is unable to make such a quantum leap. It cannot read too much into a citation to particular pages of the Court of Appeals' opinions, nor inject itself into the Court of Appeals' state of mind so as to extrapolate from those case references that the court intended its citation to relate solely to one issue, and not simultaneously to contemplate the inextricably related double jeopardy concern also entailed in those decisions. In this Court's view, implicitly, because the trial court's error was so integrally connected with a potential double jeopardy violation, the Court of Appeals' ruling is tantamount to a determination that an absence of authority to correct the error, or a failure to properly exercise the inherent power found to exist, would have implicated Morris's double jeopardy rights.

Consequently, resolution of the state law issue raised on appeal by the Trial Justice's petition required not only the Court of Appeals' consideration, but the resolution of the double jeopardy issue so as to support the court's conclusion, though somewhat cryptically stated, that "[i]n a standard application of this principle to the unusual developments here, the Trial Justice cannot be said, as a matter of law for prohibition purposes, to have improperly exercised such authority." Morris, 665 N.E.2d at 189 (emphasis added). The "unusual developments here" referred to necessarily involved the Trial Justice's improper acceptance of the misdemeanor guilty plea while

the felony count was still pending, and the trial court's subsequent exercise of authority to correct itself.

This error the trial court sought to remedy by vacating its acceptance of Morris's guilty plea because, had the court's mistake not been cured, it may very well have constituted a violation of double jeopardy later to convict Morris on the felony charge. For these reasons, this Court concludes that the New York Court of Appeals, in order to address whether the Trial Justice acted improperly, necessarily considered and adjudicated Morris's double jeopardy claim. See Williams v. Kaiser, 323 U.S. 471, 477 (1945) ("It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."). Under these circumstances, this Court finds that the Magistrate Judge's de novo review of Morris's double jeopardy claim was not warranted.

B. The Certified Question

In support of his conclusion that neither the Court of Appeals nor the First Department majority reached Morris's double jeopardy issue, the Magistrate Judge noted that the First Department granted Respondent Trial Justice leave to appeal to the New York Court of Appeals and in that connection certified a question. See Report at 9. The Magistrate Judge observed:

> In its decision, the Court of Appeals explicitly noted that "[a]s the two-Justice dissent was on a question of law, we need not answer the question certified by the Appellate Division's grant of

> leave to appeal from its final judgment." In re Van Leer-Greenberg ex rel. Morris v. Massaro, 87 N.Y.2d 996, 998, 642 N.Y.S.2d 618, 619 (1996) (emphasis added). Since the First Department dissent raises only two points of law -- one endorsing the trial court's authority to correct its own errors, the other dismissing any consequent double jeopardy violation -- and since the Court of Appeals addressed the first point, this reference to an unanswered point of law must refer to the double jeopardy.

Report at 15 n.2 (latter emphasis added). This Court finds that the conclusion the Magistrate Judge stated in this passage is not a correct finding of the fact or interpretation of the applicable law.

As a general rule, an appeal may be taken to the New York Court of Appeals in two ways: either as of right or by permission. See Siegel, New York Practice, §§ 526-28. Under section 5601(a) of the CPLR, an appeal may be taken as of right from a final order of the Appellate Division which disposes of an action, in a case where at least two Justices dissent on a question of law supporting the position of the party who takes the appeal. See N.Y. C.P.L.R. § 5601(a) (McKinney 1999). Under section 5601(b)(1), an appeal may also be taken as of right from a final order of the Appellate Division which determines an action "where there is directly involved the construction of the constitution of the state or of the United States." N.Y. C.P.L.R. § 5601(b)(1) (McKinney 1999). When an appeal from a final order of the Appellate Division satisfies these provisions, the certification of a stated question to the Court of Appeals is neither necessary nor authorized. See Wickwire Spencer Steel Co. v. Kemkit

Scientific Corp., 54 N.E.2d 336, 338 (N.Y. 1944); Keep v. City of Lockport, 195 N.E. 210, 211 (N.Y. 1935).

In other circumstances, leave to appeal to the Court of Appeals, what is referred to as an appeal by permission, may be made pursuant to C.P.L.R. § 5602 only with the approval of either the Appellate Division or the Court of Appeals. In many cases, when the Appellate Division grants leave to appeal, the order from which the appeal is taken is not considered a final order. See Siegel, New York Practice, § 528. In that event, the Appellate Division "shall certify the questions of law decisive of the correctness of its determination or of any separable portion of it." N.Y. C.P.L.R. § 5713 (McKinney 1999). The certified question is a statement of the precise issue the Appellate Division believes ought to be reviewed by the Court of Appeals.

The certification of a question serves to distinguish an appeal by permission from one as of right because the certification procedure applies only where an appeal is not authorized as a matter of right. See Fahey v. Kennedy, 244 N.Y.S.2d 603, 604 (3d Dep't 1930). Accordingly, as occurred in connection with the Trial Justice's appeal, when presented with a certified question in situations where the order of the Appellate Division appealed from is final and an appeal otherwise exists as of right, the Court of Appeals has consistently determined that it is unnecessary for it to answer the Appellate Division's certified question and typically declines to do so. See Benitez v. New York City Bd. of Educ., 541 N.E.2d 29, 32 (N.Y. 1989) ("Leave was granted by the Appellate Division on a certified question which need not be answered, as the order appealed from finally determines the action."). Accord Gonkjur Assocs. V. Abrams, 442 N.E.2d 58, 59 (N.Y. 1982); Associated Metals & Minerals v.

Kemikalija, 178 N.E.2d 715, 717 (N.Y. 1961); Weintraub v. Weintraub, 96 N.E.2d 724, 728 n.1 (N.Y. 1951); Wickwire Spencer, 54 N.E.2d at 338; Keep, 195 N.E.at 211; Manton v. Brooklyn & Flatbush Realty Co., 100 N.E. 1129, 1130 (N.Y. 1912).

In Morris's case, the facts bearing on the certification issue are clear. In May 1995, the Trial Justice, as Respondent in Morris's Article 78 proceeding, moved pursuant to C.P.L.R. § 5602(a)(2) for leave to appeal to the Court of Appeals from the Appellate Division's May 23, 1995 decision. See Objections, Ex. 4. On June 27, 1995, the Appellate Division granted Respondent's motion and certified a question: "Was the decision and order of this Court entered on May 23, 1995 properly made?" See Objections, Ex. 5. However, because there was a two-Justice dissent on a question of law, Respondent Trial Justice was also entitled and sought leave to appeal as a matter of right under CPLR § 5601 (a). He so informed the Court of Appeals on June 28, 1995. See Objections, Ex. 3.

Here, the New York Court of Appeals acted as it had in the myriad other cases in which the Appellate Division had unnecessarily certified a question in connection with an appeal that qualified to be considered as a matter of right. There was simply no need or authorization for the certification of a question. The Court of Appeals routinely disposed of the matter without answering the certified question by pointing out that, as there was a two-Justice dissent on a question of law, there was no need to answer the question certified by the Appellate Division's grant of leave to appeal from its final judgment. See Massaro, 665 N.E.2d at 189. See Reynolds v. Cropsey, 150 N.E. 303 (N.Y. 1926); Arthur Karger, The Powers of the New York Court of Appeals, § 58 (3d ed. 1997).

The question of law raised by the two-Justice dissent that gave rise to the as-of-right appeal, as is apparent from the dissenting opinion, was precisely the trial court's inherent power to correct its error in vacating Morris's misdemeanor plea without violating double jeopardy. The dissent's analysis treats the two issues as fundamentally interrelated. Consequently, this Court does not find an adequate basis to support a finding and interpretation that, as the Magistrate Judge concluded, the Court of Appeals' decision not to answer the Appellate Division's certified question could be construed as a substantive determination that the unanswered question it declined necessarily referred to Morris's double jeopardy claim. Accordingly, this Court concludes that the Court of Appeals' declination to answer the Appellate Division's certified question had no bearing, substantive or otherwise, on its holding or on the issues it considered prior to rendering its decision. To the extent that the Magistrate Judge's factual findings and legal conclusions rested on this assumption, they were not properly founded.

C. The Relevant Facts And The Law

1. The Facts

Section 2254(e)(1) of the habeas statute obliges this Court to defer to the state courts' findings of fact, which are presumed to be correct, unless the habeas petitioner overcomes a presumption of correctness. See 28 U.S.C. § 2254(e)(1); discussion, supra. Here, the Court has determined that the state trial court made explicit findings endorsed by the Court of Appeals which resolved the merits of any factual dispute and were fully supported by the record. The Court cannot support the Magistrate

Judge's factual findings and conclusions with regard to two matters.

At Morris's sentencing, the Trial Justice declared that "on July 29th, 1994, the Court issued its written decision" denying Morris's motion to dismiss the felony count and thus reinstating the felony charge. See Oct. Tr. at 7. He reiterated that "the decision of July 29th, 1994 stands." See id. at 8. Similarly, the Court of Appeals stated that

> the trial court accepted a plea of guilty from defendant on August 1, 1994 to the misdemeanor charge and agreed to impose a sentence of three years' probation. Sometime thereafter, the Trial Justice filed a written decision, dated July 29, 1994, denying the motion to dismiss and, thus, sustaining the felony count of the indictment.

Morris, 665 N.E.2d at 188.

In contrast, the Magistrate Judge concluded that the Trial Justice had produced a "back-dated written order, which despite its date clearly was not prepared until after the guilty plea was accepted." Report at 29 n.8. The Magistrate Judge made a related finding that the trial court "promulgated a back-dated written order reflecting legal make-believe. Id. at 31. This conclusion, in this Court's view, runs counter to the explicit instruction of 28 U.S.C. § 2254(e)(1) and applicable decisions of the Supreme Court which mandate appropriate deference to state court factual findings. See Parke v. Raley, 506 U.S. 20, 35 (1992), reh'g denied, 506 U.S. 1087 (1993) (citing Marshall v. Lomberger, 459 U.S. 422, 431-32 (1983)) ("[Q]uestions of historical fact, including inferences properly drawn from such facts, are . . . entitled to the

presumption of correctness accorded state court factual findings under 28 U.S.C. § 2254(d)."); Summer v. Mata, 449 U.S. 539, 545-47 (1981).

Morever, the Magistrate Judge's theory that the trial court's decision was not prepared until after its acceptance of Morris's misdemeanor plea (see Report at 31) is based on analysis and inferences not persuasively supported by the record. On this point, what the record reflects is that directly after Morris's plea, the Assistant District Attorney asked for a copy of the Trial Justice's decision with regard to the felony count and was informed by the Trial Justice's Law Secretary that it was "not yet completed" but that it would find the grand jury proceedings sufficient to reinstate the felony indictment. See Gianfrancesco Aff. Exhibit 2. Thus, there is evidence that on the date the Trial Justice accepted Morris's misdemeanor plea, the court also contemplated a reversal of its earlier oral ruling.

A statement that the decision had not been "completed," though apparently already made, is quite different from a conclusion that it not had not been "prepared" and was subsequently written and backdated. Why the trial court nonetheless accepted Morris's guilty plea on that day remains unexplained in the record, other than by the Trial Justice's admission that it was an error he later realized and sought to correct by vacating the improper plea. While as a theoretical and analytical matter the facts may be subject to different interpretations, the inference the Magistrate Judge drew was not based on a factual basis sufficient to support a convincing conclusion. Accordingly, this Court is constrained not to disturb the state court's factual findings because Morris has failed to show by clear and convincing evidence that those findings were erroneous.

2. The Law

This Court construes the language of 28 U.S.C. § 2254, coupled with its reading of Williams v. Taylor, 120 S.Ct. 1495, to require that, in considering whether to grant a habeas petition in this case, it be guided solely by relevant precedent of the United States Supreme Court. In this connection, this Court concludes that the United States Supreme Court has not addressed the specific issue related to double jeopardy that is at the heart of this matter -- whether jeopardy attaches in connection with and at the time of the acceptance of a guilty plea. See Ricketts v. Adamson, 483 U.S. 1 (1987). In the Report, the Magistrate Judge agrees with this legal conclusion. See Report at 23.

The Court of Appeals' decision rests on a premise, articulated by the Appellate Division dissent, that no double jeopardy violation would arise from state proceedings based on the reinstated felony count because the vacatur of the misdemeanor plea did not "'terminate' in a 'judgment' -- a conviction and the sentence imposed thereon . . . but only in a 'conviction' by virtue of guilty plea . . . ." See Massaro, 626 N.Y.S.2d at 782 (citations omitted). This theory was implicitly endorsed by the Court of Appeals in reversing the majority's decision and citing rulings of its own governed by the same principles. See Minaya, 429 N.E.2d 1161; Bartley, 393 N.E.2d 1029. Because the state courts treated Morris's conviction on a guilty plea as not a termination based on a judgment, the trial court could exercise its inherent power to vacate the misdemeanor guilty plea and thereafter reinstate the felony charge. Although neither the Court of Appeals nor the Appellate Division's dissent mentions the United States Supreme Court's holding in Ohio v. Johnson, 467 U.S. 493 (1984), the essence of the Court of Appeals' ruling

may be read as analogous to, not inconsistent with, or supported by reasonable inferences flowing from the doctrine the Supreme Court there enunciated. In that case, the Supreme Court held that a prosecution on two more serious offenses after a trial court, over the government's objection, accepted guilty pleas to lesser included offenses would not violate the double jeopardy clause. Id. at 494.

In the absence of clearer and more definitive Supreme Court guidance bearing on the double jeopardy issue presented here, Morris has not established that the New York Court of Appeals' adjudication of the issue on the merits resulted in a decision that was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Under these circumstances, it cannot be said that the state courts applied a rule that contradicts the governing law set forth in Supreme Court cases, or that the state courts arrived at a result different from that of the Supreme Court's precedents on a set of facts materially indistinguishable from those at issue in relevant Supreme Court decisions. See Williams, 120 S.Ct. at 1519-20. Moreover, Morris has not shown and this Court cannot conclude that the New York Court of Appeals identified the correct governing legal principle from the United States Supreme Court's decisions but unreasonably applied that principle to the facts of Morris' case. Id. at 1521-22. On this basis, the Court of Appeals' action cannot be deemed objectively unreasonable and was fully consistent with applicable habeas corpus law.

Morris cannot escape the New York Court of Appeals' interpretation of a trial judge's right under state law to correct his own error prior to imposition of sentence and the inextricable interrelation between that issue and his double jeopardy claim. In sum, the Court of Appeals'

rejection of Morris's double jeopardy claim neither was "contrary to" nor did it involve an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d)(1). Therefore, this Court concludes that under 28 U.S.C. § 2254(d)(1), as interpreted by Williams, Morris is not entitled to habeas relief.

3. De Novo Review

The Magistrate Judge's de novo review, which is based on the premise that the state courts did not adjudicate Morris's double jeopardy claim, starts with the assumption that for double jeopardy purposes, jeopardy attaches upon a conviction based on an unconditional acceptance of a guilty plea. See Report at 21-29. While acknowledging that the Supreme Court has not directly addressed whether double jeopardy attaches upon the acceptance of a guilty plea, the Magistrate Judge concluded, based on his interpretation of Johnson, that under certain circumstances a conviction based on a guilty plea could bar a subsequent prosecution based on the same offense. See Report at 27. The Magistrate Judge derived as a controlling rule of Johnson, the test that the State "had the opportunity to marshal its evidence and resources" and chose not to exercise it. See id. at 29. The Magistrate Judge then asserted that the State "never objected to Morris's guilty plea to the misdemeanor count or to the dismissal of the felony charges", and that the state could have appealed the dismissal or asked for more time to represent the felony count to the grand jury. See id. at 29-30.

The State challenges these factual findings and legal conclusions. See Objections at 16-19. It contends that the prosecutor filed an objection to the dismissal of Morris's indictment that was constant and never withdrawn; that

the State, pursuant to New York Criminal Procedure Law ("NYCPL") § 220.10(4), was not required to enter a formal objection to the trial court's acceptance of Morris's misdemeanor plea since the plea related to the entire indictment as it stood then (see NYCPL § 220.10(4) (McKinney 1993)), and thus the prosecutor's consent was not required; and that the State was unable to appeal the trial court's dismissal of the felony indictment because the decision had been rendered orally without any explanation and thus was not an appealable final order until reduced to writing and served on the parties. See id. The Court finds these arguments persuasive and supported by the record and by the applicable law.

As already set forth above, a chronological recitation of the events on the record here places this discussion in full context. These facts indicate that Morris formally moved on March 4, 1994 for an order to dismiss the indictment. Shortly thereafter, the State formally opposed the motion and provided the court with the grand jury minutes, contending that the transcript would support every element of the crimes alleged.

At the calendar call on May 10, 1994, the trial court orally announced its decision on the motion, dismissing the felony count. The Trial Justice offered no grounds and did not issue a written order. The next conference on the case occurred on June 7, 1994. The Trial Justice then reiterated that he had previously dismissed the felony charged. Responding to defense counsel's inquiry whether a written decision had been filed, the Trial Justice said there "probably was."

Morris's next court appearance occurred on August 1, 1994, the date the Trial Justice accepted Morris's guilty plea. Prior to the plea, the prosecutor requested a copy of

the court's written decision and was told she should have obtained a copy earlier. The prosecutor attested that "[d]espite . . . protests which were made off the record, that there was no written decision available," the trial court accepted Morris's plea. Gianfrancesco Aff., Ex, 2. Directly after the plea, the prosecutor was informed that the decision was not yet completed but that it would reflect that sufficient grounds existed to sustain Morris's charge count and to reinstate that count of the indictment. The prosecutor received the court's written decision "a few days later." Id.

Thus, as of the critical date Morris's misdemeanor plea was accepted, the trial court had not yet produced a final written decision and order which would have explained the basis for the Trial Justice's determination regarding the felony count and would have supplied the grounds either for a re-presentment of the case to the grand jury or for an appeal of the dismissal.

The State had already registered its objection to the dismissal when Morris's motion was made, and later allegedly renewed its protests, though off the record. Morris's plea was accepted in regard to the then only existing count of the indictment. Pursuant to NYCPL § 220.10(2), a defendant may plead to an entire indictment as a matter of right (see NYCPL § 220.10(2) (McKinney 1993)); the prosecutor's consent is not required for this purpose. Consequently, as the State argues, restating an objection it had already recorded and preserved would have been legally irrelevant and could not have prevented Morris's misdemeanor plea. See Objections at 17.

However, having been informed before the acceptance of the plea that a written decision may have been on file, and told immediately thereafter that the trial court's

formal ruling would reinstate the indictment, it appears there was little more that the State could do but await the written order, which the prosecutor avers was received "a few days later." Up to that point, filing an appeal to the dismissal may not have been possible because the requisite final order did not exist. And after being advised on the very day the trial court erroneously accepted Morris's misdemeanor plea that the felony indictment would be upheld, interposing further objection or filing any appeal would have been unfounded and impractical. The trial court, through the Trial Justice's Law Secretary, had already manifested that it would reverse itself with regard to the felony count and sustain the prosecutor's position. This event having transpired so soon after Morris's misdemeanor plea, there was nothing else the State was required to do to preserve its legal position.

On this analysis, this Court cannot fairly read the facts to support a finding that the State "never objected to Morris's guilty plea or to the dismissal of the felony charges." See Report at 29. Nor could the circumstances be construed, as decisively as the Magistrate Judge read them, to indicate as a matter of law under Johnson that the State had "a full and fair opportunity" to marshal its evidence and resources "and chose not to exercise it." Id. This record simply lacks a solid grounding of evidence manifesting the kind of purposeful prosecutorial abuse or overreaching that the Double Jeopardy Clause was intended to curtail. See Johnson, 467 U.S. at 502. To the extent the Magistrate Judge's legal conclusion rested on a factual finding that the Trial Justice accepted Morris's guilty plea to the misdemeanor with the prosecutor's approval (or at least "without objection by the prosecution" (see Report at 22), this Court does not find that the record sufficiently supports such a finding.

This Court also is unable to conclude as a matter of law that the few days that elapsed after the trial court's error afforded the State a fair opportunity to take appropriate steps to reverse it. Nor, given the reliable indications to the prosecutor by the Trial Justice's Law Secretary that very same day to the effect that the felony charge would be restored, could the Court uphold a finding that the State unreasonably failed to take any further action that could, as Morris argues and the Magistrate Judge suggested, be deemed consent by silence, or a clear manifestation of no intent to challenge the dismissal of the felony count of the indictment.

It is true that there is little in this record that commends the actions of the state trial court, and that Morris may have justifiable grounds to feel prejudiced thereby. But not every error of the government rises to the magnitude of a constitutional violation. On the facts here, this Court is not persuaded that the extensive inferences, uncertain readings of terse state court decisions and the application of such a doubtful record to unsettled federal constitutional law could be fairly reconstructed to yield a sustainable conclusion of unconstitutional action by the State.

Accordingly, this Court is of the view that, even if the State court had not adjudicated Morris's double jeopardy claim, warranting the de novo review undertaken by the Magistrate Judge, on the basis of the present record and the application of the principles articulated by the Supreme Court in Johnson, Morris would not be entitled to habeas relief because, in fact, Morris's misdemeanor plea was accepted by the trial court over the State's protests, and the prosecutor did not have a full and fair opportunity to present its evidence as to the felony count in the indictment.

CONCLUSION

For the reasons stated above, the Court denies the petition. However, a substantial showing of the denial of a constitutional right having been made, a certificate of appealability will issue with respect to Petitioner's double jeopardy claim. See 28 U.S.C. § 2253(c)(3); United States v. Perez, 129 F.3d 255, 259-60 (2nd Cir. 1997); Lozada v. United States, 107 F.3d 1011, 1014-16 (2d Cir. 1997). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Decision and Order would be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962).

SO ORDERED:

New York, New York
August 3, 2000

s/ Victor Marrero
Victor Marrero
United States District Judge

Appendix C
Report and Recommendation of United States Magistrate Judge Andrew J. Peck

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

98 Civ. 5439 (NRB) (AJP)

- x

GEORGE MORRIS,

Petitioner,

-against-

REPORT AND RECOMMENDATION

EDWARD REYNOLDS, Superintendent of Mohawk Correctional Facility,

Respondent.

- x

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Naomi Reice Buchwald, United States District Judge:

Petitioner George Morris seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, from his 1997 conviction of criminal possession of a weapon in the third degree, for which he was sentenced to two and a half to five years imprisonment. (Dkt. No. 12: Am. Pet. at 6, Dkt. No. 20: Morris Br. at 1.) Morris's petition asserts that his constitutional double jeopardy rights were violated when the state trial judge reinstated the previously dismissed indictment for the felony charge of third degree weapons possession after Morris had pled guilty to the lesser included misdemeanor charge of fourth degree weapons possession. (Dkt. No. 12: Am. Pet. at 3-4; Dkt. No. 20: Morris Br. at 2.) The State counters that Morris is not entitled to relief because his initial misdemeanor guilty

plea did not amount to an acquittal on the remaining felony count and, in any event, the New York Court of Appeals's decision in the case was not "contrary to clearly established Federal Law as set forth by the Supreme Court." (Dkt. No. 16: State Br. at 18.)

For the reasons explained below, Morris's initial guilty plea was a conviction for purposes of the Double Jeopardy Clause, "reinstatement" of the felony count violated Morris's double jeopardy rights, and therefore his habeas petition should be granted. Since the time Morris has spent incarcerated already has exceeded the maximum penalty for the misdemeanor fourth degree weapons charge, he should be ordered immediately released from state confinement.

FACTS

Indictment and Plea

In December 1993, Morris was indicted on a felony count of criminal possession of a weapon in the third degree and a lesser included misdemeanor count of criminal possession of a weapon in the fourth degree, both charging possession of a loaded pistol on November 9, 1993. (State Aff. Ex. 1: Indictment; Morris Br. at 2.)

On March 4, 1994, Morris filed an omnibus pretrial motion, inter alia, to dismiss the indictment on the ground that the evidence presented to the grand jury was insufficient. (Morris Br. at 1-2; State Aff. ¶ 6 & Ex. 2: 12/23/94 ADA Cowan Aff. at p. 1.) On May 10, 1994, Justice Dominic Massaro of State Supreme Court, Bronx County, announced from the bench his decision on the motion, dismissing the felony criminal possession count, the "top count" of the indictment. (5/10/94 Tr. at 2; see also State

Aff. ¶ 7; Morris Br. at 3.) Justice Massaro reiterated his decision at the next conference. (6/7/94 Tr. at 2: "The Court had previously . . . dismissed criminal possession of a weapon in the third degree."; see also Morris Br. at 3; State Aff. ¶ 7.)[1]

On August 1, 1994, Morris pled guilty to the "remaining count" in the indictment, i.e., the criminal possession of a weapon in the fourth degree misdemeanor count. (8/1/94 Plea Tr. at 3-4.) The plea was discussed with the judge off the record, after which Justice Massaro indicated that he was inclined to accept the plea:

> THE COURT: . . . The only count here is criminal possession of a weapon in the fourth degree?
>
> MS. VANLEER-GREENBERG [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Based on the paucity of his record, I am so inclined to accept that plea and give him a misdemeanor probationary sentence. Do you wish to make that application?

---

[1] At the June 7, 1994 conference, defense counsel told the judge that she did not have a copy of the dismissal order, and the following colloquy took place:

> MS. GREENBERG [DEFENSE COUNSEL]: Judge, first of all, I don't have a copy of the decision.
>
> THE COURT: Well, you must inform yourself. You could get a copy from the clerk.
>
> MS. GREENBERG: Is there a copy in the file?
>
> THE COURT: There probably is. In an event, we are ready to proceed.

(6/7/94 Tr. at 2-3.)

MS. VANLEER-GREENBERG: Yes, your Honor. At this time, my client, George Morris, seeks leave and permission of this Court to withdraw his heretofore entered plea of not guilty and enter a plea of guilty to criminal possession of a weapon in the fourth degree, a class A misdemeanor, in full satisfaction of this indictment.

THE COURT: Is it correct Mr. Morris, as your attorney points out, that at this time you wish to change your plea from not guilty of the remaining count, criminal possession of a weapon in the fourth degree, to guilty of that crime? Is that true?

THE DEFENDANT: Yes, sir.

(8/1/94 Plea Tr. at 3-4.) Justice Massaro then advised Morris of the rights he was giving up by pleading guilty, and heard Morris allocate that he had a loaded gun. (8/1/94 Plea Tr. at 4-12.) Justice Massaro acknowledged that Morris was pleading guilty to avoid "a more serious period of punishment and incarceration," and promised a sentence of three years' probation:

THE COURT: The Court, having heard the proof of the People and the allocution of the defendant herein, realizes that he is urging the Court to accept his plea because he is fearful of being convicted after trial and facing a more serious period of punishment and incarceration.

You're going to get a probationary sentence of three years and you will be required, of course, to stay out of difficulty for three years at the direction of the Court and under the supervision of the department of probation. . . .

(8/1/94 Plea Tr. at 12-13.)

Justice Massaro then asked the prosecutor, "aside from reserving for the People whatever right they feel they wish to exercise on the date of sentencing, is that the People's understanding, it is the Court's intention to do away with indictment 8215 of '93?" (8/1/94 Plea Tr. at 13.) The prosecutor answered, "Yes, your Honor, and as previously stated, I will reserve my right to make a sentencing recommendation for the date of sentence." (8/1/94 Plea Tr. at 13.) Justice Massaro accepted Morris's guilty plea:

> The Court having heard the allocution of the defendant and proof of the People, is satisfied that the plea, number one is strategically sound; number two, adequately counseled, and number three, interposed by this defendant, George Morris, only after a careful balancing of the alternatives open to him and in consultation with counsel.

(8/1/94 Plea Tr. at 14.)

Sometime after the August 1, 1994 guilty plea, Justice Massaro filed a written opinion, dated July 29, 1994, denying Morris's motion to dismiss the felony count, finding that "[t]he credible evidence educed [sic] from the Grand Jury is legally sufficient to sustain the indictment." (State Aff. Ex. 3: "7/29/94" Order.)

At the October 21, 1994 sentencing hearing, Justice Massaro began by advising the parties that, "[a]fter review, Criminal Possession of a Weapon in the Third Degree is reinstated." (10/21/94 Tr. at 2.) Justice Massaro offered Morris the opportunity to withdraw his guilty

plea, "which was obviously made under the impression that that had been . . . dismissed." (Id.) Morris's counsel stated the case's history for the record:

> MS. GREENBERG [DEFENSE COUNSEL]: . . . I want the record to reflect the dynamics of what took place here.
>
> On June 7th, 1994, His Honor rendered a decision on the record reading from an index card. And he said that the People have not established sufficiently the home and business exception; Criminal Possession of a Weapon Third Degree dismissed. . . . And then I said, "Judge, do I get a written decision?" and your Honor said on the record, "call my law person or my secretary."
>
> So I went back and I called His Honor's law person and he said he would forward it to my office.
>
> The case was next adjourned to August 1st at 9:30 in the morning.
>
> THE COURT: Correct.
>
> MS. GREENBERG: On August 1st at 9:30 in the morning [the prosecutor] and I appeared here, and I said, "your Honor, the defendant seeks leave and permission to withdraw his plea of not guilty and enter a plea of guilty to CPW Fourth Degree." And we negotiated the promise of the sentence of three years probation, and the People reserved their right to make a sentencing recommendation.
>
> THE COURT: Correct.
>
> MS. GREENBERG: And the defendant went to see the Department of Probation.
>
> On 9/7/94 a Ms. Terry Gottlieb telephoned my office. She represented herself as the Bureau

> Chief of [the prosecutor]. She said to me that the Court's decision does not reflect the Court dismissing CPW Three.
>
> THE COURT: That's correct.
>
> MS. GREENBEDRG: . . . [Ms. Gottlieb] said, "I'm either going to get an Article 78 or I am making a motion to vacate the plea." . . .
>
> Judge, I've received no motion to vacate the plea by the People, no Article 78.
>
> THE COURT: There was no motion to vacate by the People.
>
> MS. GREENBERG: And I've received no motion by the Court even though your law person . . . told me over the telephone that he would be good enough to mail it to me.

(10/21/94 Tr. at 3-6.) Morris's counsel stated that she "oppos[es] a sua sponte vacatur of the plea" and that Morris "wishes the plea to stand." (10/21/94 Tr. at 7.) Justice Massaro replied:

> On July 29th, 1994, the Court issued its written decision, Court having pointed out that the dismissal of Criminal Possession of a Weapon in the Third Degree previously enunciated from the Bench on 5/10, ma'am, I believe not 6/7, but in any event was incorrect. When the matter was reduced to the written decision, Court realizing its own error, corrected itself. And having done so, any Bench decision rendered either on 5/10 or 6/7 is withdrawn and the decision of July 29th, 1994 stands.
>
> . . . .
>
> In the meantime, ma'am, you know that I have suggested that I will, in fairness to your client, allow him to withdraw the plea. Should he not

> want to withdraw the plea, that is something we will go into the next time this is on.

(10/21/94 Tr. at 7-8.)

Morris's Article 78 Petition to the First Department

In December 1994, Morris's counsel filed a CPLR Article 78 petition in the First Department seeking to prohibit Justice Massaro from "sua sponte, vacating and setting aside and annulling [Morris's misdemeanor] plea of guilty" and "directing and compelling . . . Justice Massaro to impose . . . the previously promised and agreed to sentence thereupon of three (3) years probation." (State Aff. Ex. 4: Article 78 Notice ¶¶ A-B.) Morris's Article 78 petition argued that (1) Justice Massaro "had no authority to sua sponte and unilaterally without the consent or permission of the Defendant MORRIS, to attempt to vacate and set aside the plea taken by the defendant and thereafter reinstate the felony charge as previously dismissed" absent "'fraud', 'coercion', or other 'impropriety' in connection with the taking of this plea" and (2) the reinstatement of the felony count "violate[d] the defendant MORRIS's double jeopardy rights under the Constitution of the United States." (State Aff. Ex. 4: Morris Art. 78 Pet. ¶¶ 19-22.)

In response to the Article 78 petition, the prosecutor submitted an affidavit confirming the procedural history set forth above:

> On June 7, 1994 Judge Massaro stated that . . . he had previously dismissed Criminal Possession of a Weapon in the Third Degree from the indictment. When defense counsel informed Judge Massaro that she didn't have a copy of the

Court's decision, Judge Massaro responded "well, you must inform yourself, you could get a copy from the clerk." The case was thereafter adjourned to August 1, 1994.

On August 1, 1994, I appeared in part 45 before Judge Massaro. I was informed that the defendant was going to plead guilty to Criminal Possession of a Weapon in the Fourth degree. Before the plea was taken I asked Judge Massaro for a copy of his written decision. He told me that I should have gotten a copy of it sooner. Despite my protests which were made off the record, that there was no written decision available, Judge Massaro allowed the defendant to plead guilty to Criminal Possession of a Weapon in the Fourth degree. Judge Massaro also indicated that he would sentence the defendant to probation.

On August 1, 1994, directly after the plea was taken, I called Judge Massaro's Law Secretary and asked for a copy of the written decision. He told me that the written decision was not completed. However, he did say that the written decision would reflect that Judge Massaro found the Grand Jury proceedings to be legally sufficient to sustain indictment 8215/93. Several days later I received a copy of the Judge Massaro decision which was dated July 29, 1994. The written decision did in fact find that the evidence presented to the Grand Jury was legally sufficient to sustain the charges contained in indictment 8215/93.

(State Aff. Ex. 2: 12/23/94 ADA Cowan Aff. at pp. 1-2.)

The First Department granted Morris's Article 78 petition, with two judges dissenting. In re Van Leer-

Greenberg ex rel. Morris v. Massaro, 215 A.D.2d 283, 626 N.Y.S.2d 779 (1st Dep't 1995). The First Department found that the prosecution "points to no statutory authority which authorizes a court to withdraw a plea without the consent of the defendant in the absence of fraud and misrepresentation." Id. at 284, 626 N.Y.S.2d at 780. Additionally, the First Department stated that, "[a]lthough the court's ruling in dismissing the felony count was oral and later, on reflection, it was attempted to be withdrawn, full agreement having been reached prior to the withdrawal, and there being no change in circumstances the defendant was entitled to the benefit of the bargain." Id. Finding that the trial court did not have the authority to withdraw the plea, the First Department majority did not address the constitutional double jeopardy issue.

The two dissenting judges argued that the Article 78 petition should be dismissed since "it is clear that the court acted within its power." Id. at 285, 626 N.Y.S.2d at 781. The dissent reasoned that:

> It is well settled that a trial court, prior to the commencement of sentence, has the inherent power to vacate an illegal or invalid plea. Thus, since respondent had, in his own words, ruled in error, he has the inherent power to vacate the plea, which would have been improper, prior to the imposition of sentence and to correct his own error and reinstate the previously dismissed charge.

Id. at 286, 626 N.Y.S.2d at 781 (citations omitted). Additionally, the dissent found that since the court had the power to vacate the plea, there could be no double standard violation:

> Since respondent has the power to vacate the plea and restore the action to its pre-plea status, further proceedings are not barred by double jeopardy considerations. In such circumstances there is no double jeopardy violation, since a vacatur of a guilty plea is not "the equivalent of an acquittal based on an adjudication as to the factual elements of the charge." Moreover, since the proceeding did not "terminate" in a "judgment" - a conviction and the sentence imposed thereon (see, CPL 1.20[15]) - but only in a "conviction" by virtue of a guilty plea (see, CPL 1.20 [13]), the Double Jeopardy Clause of the United States Constitution is not offended.

Id. at 286-87, 626 N.Y.S.2d at 782 (citations omitted).

The New York Court of Appeal's Decision

The First Department granted leave to appeal to the New York Court of Appeals. In re Van Leer-Greenberg ex rel. Morris v. Massaro, 216 A.D.2d 972, 628 N.Y.S.2d 1013 (1st Dep't 1995). Morris's attorney argued to the Court of Appeals that, "[o]nce a court accepts a guilty plea, in the absence of fraud, the court has no inherent power to set the plea aside without the defendant's consent." (State Aff. Ex. 9: Morris Ct. App. Br. at 10; see also id. at 26.) Additionally, Morris's attorney asserted that "any further proceedings on the original charges are barred by Petitioner's constitutional right, not to be twice put in jeopardy." (Id. at 30.)

The New York Court of Appeals reversed and dismissed Morris's Article 78 proceeding. In re Van Leer-Greenberg ex rel. Morris v. Massaro, 87 N.Y.2d 996, 642 N.Y.S.2d 618 (1996). After a brief recitation of the factual

background, the Court of Appeals' reasoning is contained in a single, two-sentence paragraph that did not address the double jeopardy issue:

> Before sentence is imposed, trial courts in criminal cases have the general inherent authority to correct their own mistakes. In a standard application of this principle to the unusual developments here, the Trial Justice cannot be said, as a matter of law for prohibition purposes, to have improperly exercised such authority.

Id. at 998, 642 N.Y.S.2d at 619 (citations omitted).

Morris's Guilty Plea to the Felony Charge

On June 4, 1997, Morris pled guilty to criminal possession of a weapon in the third degree and was sentenced to two and a half to five years imprisonment. (State Aff. ¶ 16; see also Dkt. No. 5: Morris 8/25/98 Aff. in Support of Application for Appointment of Counsel.) Morris did not appeal from that conviction. (State Aff. ¶17; Pet. ¶ 8; see also Dkt. No. 6: Morris 9/14/98 Aff. at p. 2.)

Morris's Federal Habeas Petition

In March 1998, Morris filed his federal habeas petition, raising four claims: (1) the indictment was insufficient and/or improper evidence was presented to the grand jury (Dkt. No. 2: Pet. ¶ 12(A)); (2) the trial court was required to abide by the plea agreement (id. ¶ 12(B)); (3) vacatur of the guilty plea constituted double jeopardy (id. ¶ 12(C)); and (4) the trial court violated Morris's constitutional rights in not disclosing the charges and/or exculpatory evidence when requested by Morris's counsel (id. ¶ 12(D)).

Chief Judge Griesa directed Morris to show cause why his petition was not untimely under the one-year statute of limitations promulgated in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). (Dkt. No. 4: 7/30/98 Order.) I issued a Report and Recommendation in December 1998 finding the petition timely but recommending its dismissal without prejudice as a "mixed" petition since it contained claims that had never been presented to the state courts. Morris v. Reynolds, 48 F. Supp. 2d 379, 381, 382-85 (S.D.N.Y. 1998) (Baer, D.J. & Peck, M.J.). In response to my Report and Recommendation, Morris filed a "'Notice of Motion of Amendment to Complaint' which requested that any of the issues raised by his petition which were determined to be unexhausted be stricken." See id. at 379. Judge Baer adopted my Report and Recommendation and ordered that Morris's unexhausted claims be stricken and dismissed and that Morris submit an amended petition which includes "any and all exhausted claims." Id. at 380.

Morris filed a "Notice of Amended Complaint by adding his exhausted claim" (Dkt. No. 12: Notice of Motion), which appeared to raise two claims: first, that "Justice Massaro, had no authority to sua sponte and unilaterally without the consent or permission of petitioner to vacate and set aside the valid and legal plea taken by the petitioner and thereafter reinstate the felony charge [that was] previously dismissed . . . [absent] 'fraud', 'coercion', or other 'impropriety' in connection with the taking of this legal, valid plea"; and second, that the reinstatement of the felony court "violat[ed] the petitioner's double jeopardy right under the Constitution of the United States." (Id. at 3-4.) Morris clarified in a subsequent letter that he intended this document to serve as his amended petition and that he was only asserting the claims set forth therein. (Dkt. No. 14: 6/18/99 Morris

Letter.) Morris also requested the appointment of counsel. (Id.)

The State responded to the amended petition, arguing that (a) Morris's first ground must be dismissed as it "is not constitutional in nature" and (b) Morris's double jeopardy rights were not violated since "vacatur of [the] guilty plea [was] not the equivalent of an acquittal based on the adjudication as to the factual elements of the charge." (Dkt. No. 16: State Br. at 13, 18.) The State conceded that Morris's remaining claims are exhausted. (See State Aff. ¶ 19 n.1: "Since petitioner did assert a double jeopardy claim in his papers below, he exhausted this issue. . . .")

By Opinion and Order dated August 19, 1999, I granted Morris's request for appointment of counsel since "the Court believes that the issues presented in the petition are 'likely to be of substance,'" and "the legal issues appear to be highly complex and petitioner does not seem to be able to address them on his own." Morris v. Reynolds, 98 Civ. 5439, 1999 WL 632850 at *1 (S.D.N.Y. Aug. 19, 1999) (Peck, M.J.). Morris's appointed counsel, Georgia J. Hinde, submitted a brief in support of the petition on November 4, 1999 (Dkt. No. 20), and the State submitted its further opposition papers on December 14, 1999.

ANALYSIS

THE TRIAL COURT'S REINSTATEMENT OF THE FELONY COUNT AFTER UNCONDITIONALLY ACCEPTING MORRIS'S GUILTY PLEA ON THE ONLY PENDING COUNT WITHOUT OBJECTION BY THE STATE VIOLATED THE DOUBLE JEOPARDY CLAUSE

Morris's first claim, that the trial court lacked the inherent authority to reinstate the indictment, raises a question of state law that was authoritatively answered in the negative by the New York Court of Appeals. This Court has no power to disturb that finding. E.g., Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991) (a federal habeas court "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States" and thus the Supreme Court has "stated many times that 'federal habeas corpus relief does not lie for errors of state law'"; Benitez v. Senkowski, 97 Civ. 7819, 1998 WL 668079 at *5 (S.D.N.Y. Sept. 17, 1998) (Cote D.J. & Peck, M.J.); James v. Senkowski, 97 Civ. 3327, 1998 WL 217903 at *5 (S.D.N.Y. April 29, 1998) (Cote, D.J. & Peck, M.J.); Simmons v. Ross, 965 F. Supp. 473, 480 (S.D.N.Y. 1997).

Indeed, both the State (State Br. at 13) and Morris's appointed counsel (Morris Br. at 16 n.5) agree that this Court cannot address this state law issue, except to the extent it is intertwined with Morris's double jeopardy claim. The Court, therefore, turns to Morris's double jeopardy claim.

A. AEDPA Standard of Review

In 1996, the Antiterrorism and Effective Death Penalty Act amended 28 U.S.C. § 2254, setting forth the following standards for federal courts to apply when reviewing habeas corpus petitions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2).

The parties agree that this language is ambiguous and that the Courts of Appals have adopted different interpretations of this language; each party argues for an interpretation by which that party can prevail. (See State Br. at 4-12; Morris Br. at 13-16.) The issue of the proper interpretation of the AEDPA's review standard is pending before the United States Supreme Court, having been argued on the first Monday in October. See Williams v. Taylor, No. 98-9394, 119 S. Ct. 1355 (1999) (granting certiorari), 68 U.S.L.W. 3255 (Oct. 19, 1999) (discussing oral argument). The Court here need not await the Supreme Court's decision, however, since the AEDPA review standard does not apply to this case, because no state court adjudicated the merits of the federal constitutional issue. Although both Morris and the State presented arguments on the double jeopardy issue to the state courts (see State Aff. Ex. 8: State Ct. App. Br. at 16-17; State Aff. Ex. 9: Morris Ct. App. Br. at 30), neither the New York Court of

Appeals nor the First Department majority reached the double jeopardy issue.[2]

Since no state court ruled on the double jeopardy issue, this Court can and should engage in a de novo review of the double jeopardy claim, and need not interpret the AEDPA review standard. See, e.g., Weeks v. Angelone, 176 F.3d 249, 258 (4th Cir.) ("When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits . . ., our review of questions of law and mixed questions of law and fact is de novo," citing Jones v. Jones, 163 F.3d 285, 299-300 (5th Cir. 1998), cert denied, 120 S. Ct. 224 (1999)), cert. granted, 120 S. Ct. 30 (1999); accord Goins v. Angelone, 52 F. Supp. 2d 638, 676 n.32 (E.D. Va. 1999).

The State asserts, however, that the New York Court of Appeals implicitly found that the trial judge's actions did not violate Morris's double jeopardy rights:

> The Court of Appeals' decision had to have held and decided that the trial court's vacatur of the plea, before sentencing, to correct its own error did not violate the Double Jeopardy Clause, especially when both parties brief the issue. Both

---

[2] In its decision, the Court of Appeals explicitly noted that "[a]s the two-Justice dissent was on a question of law, we need not answer the question certified by the Appellate Division's grant of leave to appeal from its final judgment." In re Van Leer-Greenberg ex rel. Morris v. Massaro, 87 N.Y.2d 996, 998, 642 N.Y.S.2d 618, 619 (1996) (emphasis added). Since the First Department dissent raises only two points of law - one endorsing the trial court's authority to correct its own errors, the other dismissing any consequent double jeopardy violation - and since the Court of Appeals addressed the first point, this reference to an unanswered point of law must refer to the double jeopardy issue.

> cases cited by the Court of Appeals for the proposition that the trial court had the inherent authority to vacate a guilty plea (see People v. Bartley, 47 N.Y.[2d] 965[, 419 N.Y.S.2d 956] [1979] and People v. Minaya, 54 N.Y.[2d] 360[, 445 N.Y.S.2d 690] [1981]), concluded that the double jeopardy clause was not violated. Similarly, the Court's opinion included reference to two cases for comparison. Those cases (see Matter of Kisloff v. Covington, 73 N.Y.2d 445[, 541 N.Y.S.2d 737] [1989] and Matter of Campbell v. Pesce, 60 N.Y.2d 165[, 468 N.Y.S.2d 865] [1989]) held the trial court lacked the inherent authority to vacate a guilty plea and, thus, violated the Double Jeopardy Clause. Therefore, the Court of Appeals in finding that the trial court had the inherent power to vacate petitioner's guilty plea implicitly agreed that the Double Jeopardy Clause was not violated.

(State Br. at 15.)

It is true that the Court of Appeals's decision cited to Bartley and Minaya and that those opinions found that the vacatur of guilty pleas did not violate the Double Jeopardy Clause. However, the Court of Appals cited to specific pages of the opinions - People v. Bartley, 47 N.Y.2d at 966, and People v. Minaya, 54 N.Y.2d at 364. The double jeopardy holding and analysis did not appear on those pages. See People v. Bartley, 47 N.Y.2d at 967; People v. Minaya, 54 N.Y.2d at 365-66. The Court of Appeals apparently was not citing Bartley and Minaya for their double jeopardy holdings, but rather for their analysis of the state law power-to-correct-error issue.

In its "comparison" cities, the Court of Appeals cited specific pages of Kisloff and Campbell that happen to discuss double jeopardy. See Matter of Kisloff v. Covington, 73 N.Y.2d 445, 452, 541 N.Y.S.2d 737, 741-42 (1989); Matter of Campbell v. Pesce, 60 N.Y.2d 165, 168-69, 468 N.Y.S.2d 865, 866-67 (1983). However, the main focus of the discussion on these pages was that trial courts have the inherent authority to correct their own mistakes, but that the trial courts in those two cases acted beyond their authority when they vacated the pleas. See Matter of Kisloff v. Covington, 73 N.Y.2d at 452, 541 N.Y.S.2d at 741; Matter of Campbell v. Pesce, 60 N.Y.2d at 168-69, 468 N.Y.S.2d at 866-67. Indeed, in Campbell, the court's discussion of "the inherent power of a court to correct its own error in connection with accepting a plea or imposing sentence," including discussion of Minaya and Bartley, begins on page 168 and continues on to page 169 - the two pages cited by the Court of Appeals. Therefore, I conclude that the New York Court of Appeals was not citing these cases for their double jeopardy holdings.

Since there is no determination of the double jeopardy issue, either express or implied, in the Court of Appeals's decision, this Court will conduct a de novo review of Morris's double jeopardy claim.

B. Merits of Morris's Double Jeopardy Claim

1. The Prohibition on Successive Prosecution After a Guilty Plea

The Double Jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This prohibition applies to state prosecutions through the Fourteenth Amendment. Benton v.

Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969); accord, e.g., Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 2250 (1998); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969).

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. at 717, 89 S. Ct. at 2076 (fn. citations omitted); accord, e.g., Monge v. California, 118 S. Ct. at 2250; Ohio v. Johnson, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540 (1984); Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977); Boyd v. Meachum, 77 F.3d 60, 63 (2d Cir.), cert. denied, 519 U.S. 838, 117 S. Ct. 114 (1996); United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982), cert. denied, 460 U.S. 1070, 103 S. Ct. 1525 (1983). The provision "serves principally as a restraint on courts and prosecutors." Brown v. Ohio, 432 U.S. at 165, 97 S. Ct. 2225. "[T]he bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." Ohio v. Johnson, 467 U.S. at 498-99, 104 S. Ct. at 2540. Importantly, the Double Jeopardy Clause "represents a constitutional policy of finality for the defendant's benefit in . . . criminal proceedings." United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554 (1971); accord, e.g., Brown v. Ohio, 432 U.S. at 165, 97 S. Ct. at 2225; see generally, e.g., Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223-24 (1957) ("[T]he State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and

compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.").

Specifically relevant here, the Double Jeopardy Clause's prohibition on re-prosecution after conviction means that a state may not prosecute a defendant for a greater offense after he has been convicted of a lesser included offense. Brown v. Ohio, 432 U.S. at 169, 97 S. Ct. at 2277; accord, e.g., United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 2856 (1993); Ohio v. Johnson, 467 U.S. at 501, 104 S. Ct. at 2542 ("Previously, we have recognized that the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense," citing Brown v. Ohio); Illinois v. Vitale, 447 U.S. 410, 416, 421, 100 S. Ct. 2260, 2265, 2267 (1980); United States v. Gallego, 191 F.3d 156, 170-71 (2d Cir. 1999); Boyd v. Meachum, 77 F.3d at 63 ("a prior conviction for the lesser included offense prohibits a later prosecution for the greater offense"); United States v. LoRusso, 695 F.2d at 53; United States v. Persico, 620 F. Supp. 836, 844-45 (S.D.N.Y. 1985) (Brown v. Ohio, "the seminal case in the area, . . . established the general rule that the Double Jeopardy Clause prohibits the government from trying a defendant for a greater offense after it has convicted him of a lesser included offense."); see also, e.g., Ex parte Nielson, 131 U.S. 176, 187-89, 9 S. Ct. 672, 676 (1889) (barring prosecution for adultery after a guilty plea for unlawful cohabitation, because conviction of "a greater crime is a bar to a subsequent prosecution for a lesser one.").

The seminal case in this area is the Supreme Court decision in Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221 (1977). In Brown, the defendant pled guilty to "joyriding,"

the crime of operating a vehicle without the owner's consent. Id. at 162, 97 S. Ct. at 2223-24. After he completed his 30-day jail sentence, he was indicted for theft of the same car, a greater offense which under Ohio law includes the misdemeanor of joyriding. Id. at 162-63, 97 S. Ct. at 2224. The Supreme Court found that the Double Jeopardy Clause barred the second prosecution for car theft since the greater and lesser included offenses were the "same offense" under state law for double jeopardy purposes. Id. at 169-70, 97 S. Ct. at 2227. The Supreme Court extended to successive prosecutions the test of Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932), for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment. Brown v. Ohio, 432 U.S. at 166, 97 S. Ct. at 2225-26. Under Blockburger:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . . ."

Brown v. Ohio, 432 U.S. at 166, 97 S. Ct. at 2225 (quoting Blockburger v. United States, 284 U.S. at 304, 52 S. Ct. at 182). Applying this test in Brown, the Supreme Court determined that the two crimes constituted a single offense, nothing that a "greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser included offense included in it." Brown v. Ohio, 432 U.S. at 168, 97 S. Ct. at 2226-27. Because Brown had been put in jeopardy once based on his joyriding conviction, the Double Jeopardy Clause barred the second prosecution for stealing the automobile. Id. at 169-70, 97 S. Ct. at 2227. In so holding, the Supreme Court empha-

sized that, "[w]hatever the sequence may be, the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense." Id. at 169, 97 S. Ct. at 2227.

2. Application to Morris's Misdemeanor Guilty Plea and Subsequent Felony Prosecution

In order to show that the double jeopardy prohibition on re-prosecution after conviction applies, Morris must show that (1) he was convicted of an offense - the misdemeanor criminal weapons possession charge, and (2) reinstatement of the felony count of the indictment was a subsequent prosecution for the same offense.

It is uncontested that under New York law, criminal possession of a weapon in the fourth degree is a lesser included count of criminal possession of a weapon in the third degree. (See Morris Br. at 17 n.16.)[3] The only remain-

---

[3] Under N.Y. Penal Law § 265.02(4), a person is guilty of criminal possession of a weapon in the third degree when he or she "possesses any loaded firearm," unless "such possession takes place in such person's home or place of business." Under N.Y. Penal Law § 265.01(1), a person is guilty of criminal possession of a weapon in the fourth degree when he or she "possesses any firearm." Fourth degree weapons possession, therefore, does not require proof of any additional fact not required by third degree weapons possession, and the misdemeanor fourth degree weapons possession count is a lesser included offense of the felony third degree weapons possession count. See, e.g., Johnson v. Morganthau, 69 N.Y.2d 148, 152, 512 N.Y.S.2d 797, 800 (1987); (fourth degree weapons possession charge is "a lesser included offense of criminal possession of a weapon in the third degree, and constitutes the same crime for double jeopardy purposes."); People v. Perez, 128 A.D.2d 410, 411, 512 N.Y.S.2d 695,

(Continued)

ing question, then, is whether what happened to Morris up to and including his August 1, 1994 plea allocution was a "conviction" for double jeopardy purposes - that is, whether "jeopardy attached" before reinstatement of the felony charge.

In Brown v. Ohio, the defendant pled guilty, was sentenced, and served his sentence for the lesser included offense. Brown v. Ohio, 432 U.S. 161, 162, 97 S. Ct. 2221, 2223-24 (1977). Here, by contrast, Morris pled guilty upon the promise of a sentence of probation, and his guilty plea was accepted by the trial court without objection by the prosecutor. (8/1/94 Plea Tr. at 3-4, 12-13.) Thereafter, the indictment on the felony count was reinstated before Morris had been formally sentenced or judgment entered. (10/21/94 Tr. at 2.)

In general, a guilty plea constitutes a conviction, as the Supreme Court explained:

> A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless

---

(3... continued)
696 (1st Dep't 1987) ("Since it is impossible to possess a loaded firearm without concomitantly possessing a firearm, criminal possession of a weapon in the fourth degree is clearly a lesser included offense of criminal possession of weapon in the third degree."); see also, e.g., Schuler v. Herbert, No. CV 95-4932, 1997 WL 793097 at *1 (E.D.N.Y. Nov. 19, 1997) ("The trial court reduced one of the counts of Criminal Possession of a weapon in the Third degree to the lesser included charge of Criminal Possession of a weapon in the Fourth degree.").

> made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound.

Kercheval v. United States, 274 U.S. 220, 223-24, 47 S. Ct. 582, 583 (1927); accord, e.g., Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 112-13, 103 S. Ct. 986, 991-92 (1983); Bakic v. United States, 971 F. Supp. 697, 699-700 (N.D.N.Y. 1997) ("a guilty plea is itself a conviction," citing Kercheval); United States ex rel. Brown v. LaVallee, 301 F. Supp. 1245, 1251-52 (S.D.N.Y. 1969); see also, e.g., 1A Charles Alan Wright, Federal Practice & Procedure: Criminal 3d § 175 at p. 221 (entry of a guilty plea "leav[es] the court nothing to do but impose sentence and enter judgment"),[4] cf. Green v. United States, 355 U.S. 184, 188, 78 S. Ct. 221, 223-24 (1957) ("it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'").

The Supreme Court has not directly addressed whether jeopardy attaches for double jeopardy purposes upon a court's unconditional acceptance of a guilty plea. See Ricketts v. Adamson, 483 U.S. 1, 8, 107 S. Ct. 2680, 2685 (1987) (assumes without deciding "that jeopardy attached at least when respondent was sentenced" after entering a guilty plea). The Second Circuit and several other courts, however, have ruled that a guilty plea is a conviction for Double Jeopardy Clause purposes when it is unconditionally accepted by the court. United States v. Cambindo

---

[4] Under New York law, a "conviction" is defined as "the entry of a plea of guilty to . . . an accusatory instrument . . . or to one or more counts of such instrument." N.Y. CPL § 1.20(13).

Valencia, 609 F.2d 603, 637 (2d Cir. 1979) ("[I]t is axiomatic of the Double Jeopardy Clause that jeopardy attached once [the defendant's] guilty plea was accepted."), cert denied, 446 U.S. 940, 100 S. Ct. 2163 (1980); Matthews v. Keane, 94 Civ. 2815, 1995 WL 459251 at *3 (S.D.N.Y. Aug. 3, 1995) ("Jeopardy attaches to plea convictions only when the guilty plea is accepted unconditionally by the court."); see, e.g., United States v. Faber, 57 F.3d 873, 874 (9th Cir. 1995) ("Jeopardy ordinarily attaches in a criminal proceeding when the court accepts a plea agreement."); United States v. Britt, 917 F.2d 353, 356 n.3 (8th Cir. 1990) (assuming "that jeopardy attached when [defendant's] guilty plea was accepted by the court."), cert. denied, 498 U.S. 1090, 111 S. Ct. 971 (1991); United States v. Smith, 912 F.2d 322, 324 (9th Cir. 1990) ("Jeopardy ordinarily attaches upon the court's acceptance of a plea agreement."); United States v. Baggett, 901 F.2d 1546, 1548 (11th Cir.) ("In the case of a plea bargain, with respect to the offense pleaded to, jeopardy normally attaches when the court unconditionally accepts a guilty plea."), cert. denied, 498 U.S. 862, 111 S. Ct. 168 (1990); United States v. Kim, 884 F.2d 189, 191 (5th Cir. 1989) (defendant "is correct in stating that jeopardy attaches with the acceptance of a guilty plea"); Fransaw v. Lynaugh, 810 F.2d 518, 523 & n.9 (5th Cir.) ("[T]he rule in this Circuit with respect to the offense pleaded to is that 'jeopardy attaches with the [unconditional] acceptance of a guilty plea.' . . . This seems to be the general rule.") (citing cases), cert. denied, 483 U.S. 1008, 107 S. Ct. 3237 (1987); United States v. Sanchez, 609 F.2d 761, 762 (5th Cir. 1980) ("Jeopardy attaches with the acceptance of a guilty plea."); United States v. Bullock, 579 F.2d 1116, 1118 (8th Cir.) ("Of course, jeopardy would attach when a plea of guilty is accepted."), cert. denied, 439 U.S. 967, 99 S. Ct. 456 (1978); United States v. Jerry, 487 F.2d 600, 606 (3rd Cir. 1973) ("jeopardy therefore attached with the acceptance of his guilty plea by the

district court"); Riadon v. United States, 274 F.2d 304, 306 (6th Cir.), cert. denied, 364 U.S. 896 (1960).[5] Indeed, the State concedes in its brief that "[t]he question of when jeopardy attaches to a guilty plea, while not yet decided by the Supreme Court [citing Ricketts], has generally been considered attached when a guilty plea is accepted [citing Cambindo Valencia]." (State Br. at 17.)

These cases, however, should be read in light of the Supreme Court's 1987 decision in Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536 (1987), which came eight years after the otherwise controlling statements of the Second Circuit in Cambindo Valencia. In Johnson, the defendant pled guilty to pending lesser included offenses over the prosecutor's objection. Ohio v. Johnson, 467 U.S. at 496, 104 S. Ct. at 2539. "Over the State's objection, the trial court accepted the guilty pleas and sentenced [Johnson] to a term of imprisonment." Id. Johnson then moved to dismiss the two remaining, more serious charges against him under the Double Jeopardy Clause. Id. "The trial court granted [Johnson's] motion and dismissed the remaining charges, finding that because involuntary manslaughter and grand theft were, respectively, lesser included offenses of the remaining charges of murder and aggravated robbery, continued prosecution of the greater offenses after acceptance of [Johnson's] guilty pleas on the lesser offenses was barred by the Double Jeopardy Clause." Id. The Supreme Court disagreed, holding that

---

[5] See also, e.g., United States v. Barbosa, 224 F. Supp. 628, 630 (D.P.R. 1963); Ohio v. Knaff, 128 Ohio App. 3d 90, 92-93, 713 N.E.2d 1112, 1114-15 (Ct. App. 1998); South Dakota v. McAlear, 519 N.W.2d 596, 599-600 (S.D. 1994); Wisconsin v. Comstock, 168 Wis. 2d 915, 940, 485 N.W.2d 354, 364 (1992) ("several federal circuit courts of appeal have recently concluded that jeopardy attaches upon acceptance of a guilty plea").

since the greater charges remained pending at the time of the guilty plea and since the State objected to the plea, the trial court's acceptance of the guilty plea did not imply an acquittal of the remaining charges, and the State was not given "the opportunity to marshal its evidence and resources more than once." Id. at 501, 104 S. Ct. at 2542. Therefore, the Supreme Court concluded, "the principles of finality and prevention of prosecutorial overreaching applied in Brown [v. Ohio do not] reach this case." Ohio v. Johnson, 467 U.S. at 501, 104 S. Ct. at 2542.[6]

---

[6] The Supreme Court's analysis is worth quoting more fully:

> We do not believe, however, that the principles of finality and prevention of prosecutorial overreaching applied in Brown reach this case. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here respondent offered only to resolve part of the charges against him, while the State objected to disposing of any of the counts against respondent without a trial. Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws.

Id. at 501-02, 104 S. Ct. at 2542 (citations omitted).

Given this intervening Supreme Court precedent, the rule of Cambindo Valencia - that jeopardy automatically attaches upon unconditional acceptance of a guilty plea - no longer applies in every case. Rather, in determining whether a guilty plea prevents re-prosecution for the same offense, the Supreme Court appears to call for an analysis of the defendant's interests in "finality and prevention of prosecutorial overreaching." Ohio v. Johnson, 467 U.S. at 501, 104 S. Ct. at 2542. In addition, Johnson requires a court to ensure that the State has "one full and fair opportunity to convict those who have violated its laws." Ohio v. Johnson, 467 U.S. at 502, 104 S. Ct. at 2542. Therefore, "the conclusion that jeopardy has attached" - through judicial acceptance of a guilty plea - "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Illinois v. Somerville, 410 U.S. 458, 467, 93 S. Ct. 1066, 1072 (1973); accord, e.g., United States v. Baggett, 901 F.2d at 1548.[7]

---

[7]In its reply brief, the State cites United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982), for the proposition that a trial court can correct its error until entry of judgment without double jeopardy problems. (State Reply Br. at 4-5.) LoRusso, however, is factually distinguishable. There, during trial the trial judge orally dismissed one count (drug possession with intent to distribute) for insufficient evidence (of intent to distribute), and the government immediately asked the court to allow a lesser included offense (simple drug possession) to go to the jury. United States v. LoRusso, 695 F.2d at 50-51. Defendant claimed that submission of the reduced count violated his double jeopardy rights. Id. at 51. The Second Circuit merely held that because no judgment of acquittal was entered and there was no dismissal of the jury, the trial court was free to modify its oral ruling dismissing the original count. Id. at 54. The Second Circuit was careful to emphasize that it was not suggesting that "entry of a judgment . . . is a prerequisite to the termination of the prosecution for double jeopardy purposes." Id.

(continued)

Thus, there is no double jeopardy violation where a plea agreement has been breached or withdrawn by the defendant, see, e.g., Ricketts v. Adamson, 483 U.S. 1, 8, 107 S. Ct. 2680, 2685 (1987) (defendant's breach of an unconditionally accepted plea agreement removes any double jeopardy bar to prosecution on a greater charge); United States v. Podde, 105 F.3d 813, 817 (2d Cir. 1997); United States v. Baggett, 901 F.2d at 1549; United States v. Kim, 884 F.2d at 191-92 ("if a defendant withdraws his guilty plea after conviction on that plea, the Double Jeopardy Clause does not prohibit trial on the same charge"); Fransaw v. Lynaugh, 810 F.2d at 524-29; or where the court's acceptance of the guilty plea was conditional or contingent, see, e.g., United States v.

(7 ... continued)

> [H]ad the jury been dismissed following the court's oral decision, the absence of a judgment would have been irrelevant to the constitutional issue. Rather, we advert to the absence of a judgment merely to emphasize the inchoate nature of the oral decision seized on by the defendants. . . . In the circumstances of this case, where the court's oral decision was followed promptly by the modification providing for the reduction instead of the elimination of count 2, and where the reduced count could be, and was, submitted in the normal course of the trial to the original jury, we conclude that the action of the trial court did not violate principles of double jeopardy.

Id. Here, the trial court did not correct its error during trial; it unequivocally accepted Morris's guilty plea, and did not try to withdraw its acceptance of that plea until the date of Morris's sentencing. The factual situation in Morris's case is far different from LoRusso. LoRusso clearly does not stand for the proposition that the court's errors can be corrected in all situations as long as judgment is not officially entered. The entry of judgment is not key; what is essential is whether the error-correction was within the course of an ongoing trial as in LoRusso or only after unequivocal acceptance of Morris's guilty plea, as here. LoRusso is of no assistance to the State.

Cordova-Perez, 65 F.3d 1552, 1555-1557 (9th Cir. 1995), cert. denied, 519 U.S. 838, 117 S. Ct. 113 (1996); United States v. Sanchez, 609 F.2d at 763; or where, as in Ohio v. Johnson, the greater charges were still pending at the time of the guilty plea, see, e.g., United States v. Combs, 634 F.2d 1295, 1298 (10th Cir. 1980), cert. denied, 451 U.S. 913, 101 S. Ct. 1987 (1981); United States v. Schuster, 769 F.2d 337, 342-43 (6th Cir. 1985), cert. denied, 475 U.S. 1021, 108 S. Ct. 1210 (1986); Bally v. Kemna, 65 F.3d 104, 108-09 (8th Cir. 1995), cert. denied, 516 U.S. 1118, 116 S. Ct. 923 (1996).

In this case, it is clear both that Morris' finality interest has been infringed and that the State had a full and fair opportunity to convict Morris on the felony charge, but did not utilize that opportunity. Morris entered a guilty plea only after the felony charge was dismissed.[8] Morris had every right to anticipate that the result achieved on

---

[8] The State argues that the trial court "never intended to dismiss the felony charge for lack of legal sufficiency . . ." (State Br. at 18; see also State Reply Br. at 4.) The record is to the contrary. Justice Massaro was clear, both in two prior conferences and at the guilty plea allocution, that the felony charge had been dismissed. (See 5/10/94 Tr. at 2; 6/7/94 Tr. at 2; 8/1/94 Plea Tr.) The back-dated written order, which despite its date clearly was not prepared until after the guilty plea was accepted, does not undermine the trustworthiness or solemnity of the plea proceeding itself. "Defendants and their lawyers should understand that the entry of a guilty plea is not an idle ceremony but a solemn proceeding not to be set aside at the whim of a defendant who may have had a change of heart." Fluitt v. Superintendent, Green Haven Correctional Facility, 480 F. Supp. 81, 87 (S.D.N.Y. 1979) (Weinfeld, D.J.); see also, e.g., United States v. Hyde, 520 U.S. 670, 676-77, 117 S. Ct. 1630, 1634 (1997); Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468 (1970); United States v. Blackwell, 172 F.3d 129, 131 (2d Cir. 1999). While Judge Weinfeld's words were aimed at defendants, they seem equally applicable to the trial judge here.

August 1, 1994 was a final resolution to the matter. (See 8/1/94 Plea Tr. at 12-13, quoted at pages 3-4, above.) Furthermore, the State never objected to Morris's guilty plea to the misdemeanor count or to the dismissal of the felony charges. The State "had the opportunity to marshal its evidence and resources" and chose not to exercise it. Ohio v. Johnson, 467 U.S. at 501, 104 S. Ct. at 2542. The State could have raised its objections to acceptance of the plea, and asked for time to re-present the felony count to a grand jury. The State did neither. In contrast to the defendant in Ohio v. Johnson, Morris has not used "the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." Ohio v. Johnson, 467 U.S. at 502, 104 S. Ct. at 2542. Rather, he unconditionally pled guilty to the only charge then pending against him and asks that his guilty plea be enforced. Under the circumstances at bar - where the trial judge dismissed the greater charge and unconditionally accepted the guilty plea to the sole remaining lesser count with the prosecutor's approval (or at least without objection by the prosecution) - Morris's guilty plea amounted to a conviction for purposes of the Double Jeopardy Clause, and thus a subsequent prosecution on the reinstated felony count was barred.

The State points out that some other circuits have "questioned the rationale" of the absolute rule that jeopardy attaches with the trial court's unconditional acceptance of a guilty plea. (State Br. at 17 n.4.) However, those cases all involved situations in which greater charges were still pending at the time of the guilty plea to lesser included charges, or in which the defendant voluntarily withdrew his guilty plea, or in which the defendant breached the plea agreement. In short, those cases are entirely consistent with the Supreme Court's refinement of the guilty-plea-as-jeopardy rule in Ohio v. Johnson. For

example, the State points to Gilmore v. Zimmerman, 793 F.2d 564, 570-71 (3rd Cir.), cert. denied, 479 U.S. 962, 107 S. Ct. 459 (1986) (State Br. at 17 n.4), but in Gilmore the greater charge of criminal homicide was still pending at the time the defendant entered a plea to the lesser charge of involuntary homicide. Gilmore v. Zimmerman, 793 F.2d at 569-70. In addition, in Gilmore the trial judge issued a written opinion explaining his reasons for vacating the guilty plea - the plea was equivocal, there was insufficient factual basis for it, and the factual defects became more apparent when the defendant declined to answer questions at sentencing. Id. at 567. Finally, Gilmore did no more than recognize that absolute language in a prior decision (that jeopardy attaches on acceptance of a guilty plea) no longer applies after Ohio v. Johnson in cases where the greater charge is still pending at the time of the plea. Gilmore v. Zimmerman, 793 F.2d at 571. Morris's case is easily distinguishable from Gilmore: no other charges were pending against Morris at the time his guilty plea was accepted; Justice Massaro gave no reason for vacating Morris's plea, the factual basis of which was not disputed; and Justice Massaro promulgated a back-dated written opinion reflecting legal make-believe: that the felony charge had not, in fact, been dropped at the time of the plea allocution.

The State also cites to the First Circuit's decision in United States v. Santiago Soto, 825 F.2d 616, 620 (1st Cir. 1987), holding that jeopardy did not attach after a guilty plea but before sentencing. (See State Br. at 4 n.17.) However, in Santiago Soto, the plea was accepted and then rejected a few minutes later when the defendant denied having committed the offense. United States v. Santiago Soto, 825 F.2d at 617. The prosecutor objected to the court's vacation of the guilty plea at that point, but the

defendant did not. Id. Santiago allowed his guilty plea to be vacated and took his chances that greater punishment or no punishment might be imposed; by contrast, Morris insisted that his guilty plea should stand and now seeks merely to limit his punishment to what all parties had agreed on August 1, 1994. See generally Wisconsin v. Comstock, 168 Wis. 2d 915, 940-43, 485 N.W.2d 354, 364-65 (1992) (distinguishing Santiago Soto and Gilmore as cases where the trial judge found insufficient basis for the guilty plea and therefore the defendants were not "placed in jeopardy in any meaningful sense" from facts, similar to Morris's, where the guilty plea was accepted with an undisputed factual basis).[9]

CONCLUSION

For the reasons stated above, I recommend that Morris's habeas petition be granted, his felony conviction vacated and misdemeanor conviction reinstated, and that he be ordered immediately released from state custody.

---

[9] Finally, the State cites United States v. Foy, 28 F.3d 464, 471 n.13 (5th Cir.), cert. denied, 513 U.S. 1031, 115 S. Ct. 610 (1994). (State Br. at 17 n.4.) This footnote in Foy recognizes that the First Circuit's approach in United States v. Cruz, 709 F.2d 111, 114 (1st Cir. 1983) (acceptance of guilty plea can be revoked only on showing of "manifest necessity") did not survive the Supreme Court's decision in Ohio v. Johnson. See also United States v. Santiago Soto, 825 F.2d at 619-20 (since under Johnson it is unnecessary to show "manifest necessity" to vacate a guilty plea, the Supreme Court "seems to have overruled our double jeopardy analysis in Cruz"). The Court's decision here is consistent with Ohio v. Johnson, and thus the Foy footnote is not relevant.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Naomi Reice Buchwald, 500 Pearl Street, Room 2270 and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Buchwald. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Hermann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York
December 16, 1999

Respectfully submitted,

s/ Andrew J. Peck
Andrew J. Peck
United States Magistrate Judge

Copies to:

Georgia J. Hinde, Esq.
George Morris
Raffaelina Gianfrancesco, Esq.
Judge Naomi Reice Buchwald

Appendix D

***VanLeer-Greenberg ex rel. Morris v. Massaro*, 87 N.Y.2d 996, 665 N.E.2d 188, 642 N.Y.S.2d 618 (1996)**

1 No. 44
In the Matter of Valerie Van
Leer-Greenberg, Esq., on behalf
of George Morris,
Respondent,
v.
Hon. Dominic R. Massaro, etc.,
et al.,
Appellants.

Allen H. Saperstein, for appellants.
Valerie Van Leer-Greenberg, for respondent.

MEMORANDUM:

The judgment of the Appellate Division should be reversed, without costs, and the petition dismissed.

The CPLR article 78 prohibition proceeding sought (1) to bar respondent Trial Justice from sua sponte vacating defendant Morris's guilty plea, and (2) to compel the Trial Justice to impose the promised sentence on a misdemeanor conviction based on the plea.

Defendant was indicted in December 1993 on a class D felony count of criminal possession of a weapon in the third degree (Penal Law §265.02[4], and a class A misdemeanor count of criminal possession of a weapon in the fourth degree (Penal Law §265.01[1]. He moved to dismiss the indictment for legal insufficiency of the Grand Jury evidence. Although no formal decision was rendered on the motion, the Trial Justice, on two different pretrial court appearances, announced from the bench that the felony charge was dismissed.

Based on this premise, the Trial Court accepted a plea of guilty from defendant on August 1, 1994 to the misdemeanor charge and agreed to impose a sentence of three years probation. Sometime thereafter, the Trial Justice filed a written decision, dated July 29, 1994, denying the motion to dismiss and, thus, sustaining the felony count of the indictment. On October 21, 1994, the sentencing date, he also orally advised the parties that the felony count was reinstated and offered defendant the opportunity to withdraw the guilty plea to the misdemeanor count. Defendant refused. On December 6, 1994, defense counsel initiated the instant collateral prohibition proceeding as petitioner on behalf of her client in the criminal proceeding.

The Appellate Division, with two Justices dissenting, granted the petition and remanded the case "for sentence in accordance with the agreement entered upon the record." As the two-Justice dissent was on a question of law, we need not answer the question certified by the Appellate Division's grant of leave to appeal from its final judgment (see, CPLR 5601[a]). We now reverse.

Before sentence is imposed, trial courts in criminal cases have the general inherent authority to correct their own mistakes (see, People v Bartley, 47 NY2d 965, 966; see also, People v Minaya, 54 NY2d 360, 364; compare, Matter of Kisloff v Covington, 73 NY2d 445, 452; Matter of Campbell v Pesce, 60 NY2d 165, 168-169). In a standard application of this principle to the unusual developments here, the Trial Justice cannot be said, as a matter of law for prohibition purposes, to have improperly exercised such authority.

* * *

Judgment reversed, without costs, petition dismissed and certified question not answered upon the ground that it is unnecessary, in a memorandum. Chief Judge Kay and Judges Simons, Titone, Bellacosa, Smith, Levine and Ciparick concur.

Decided March 21, 1996

Appendix E
***VanLeer-Greenberg ex rel. Morris v. Massaro*, 215 A.D.2d 283, 626 N.Y.S.2d 779 (1st Dept. 1995)**

Sullivan, J.P., Ellerin, Kupferman, Williams, Tom, JJ.

53817
[M-6251] In re Application of Valerie Van Leer-Greenberg, Esq., on behalf of George Morris,
Petitioner, Pro Se

For a Judgment, etc.,

-against-

Hon. Dominic R. Massaro, etc., et al.,
Respondents. A.H. Saperstein

Petition, pursuant to CPLR Article 78, to prohibit respondent, Justice Dominic R. Massaro of the Supreme Court, Bronx County, from sua sponte vacating the guilty plea of defendant George Morris and directing that he proceed to trial, granted, the plea reinstated and the matter remanded to Supreme Court for sentence in accordance with the agreement entered upon the record, without costs.

The defendant was indicted for criminal possession of a weapon in the third degree, a Class D felony pursuant to Penal Law §265.02(4), and criminal possession of a weapon in the fourth degree, a Class A misdemeanor in violation of Penal Law §265.01(1).

The Justice presiding dismissed the felony count and on two occasions stated that it had been dismissed. Thereafter, the defendant pleaded guilty to the misdemeanor and after a thorough allocution was informed that the sentence would be three years.

At the time of sentence the court stated that the dismissal of a felony count had been in error and that it was reinstated and that the defendant, under the circumstances, could withdraw his plea to the misdemeanor.

The petition asks that the agreed sentence be imposed and that the prosecution for the dismissed count be prohibited.

At the time of the plea the People raised no objection and did not contend that it could not be in full satisfaction of the charge.

The respondent Justice has not appeared in this proceeding. The respondent District Attorney has moved to dismiss the petition on the ground that a writ of prohibition does not lie in the circumstances.

Respondent points to no statutory authority which authorizes a court to withdraw a plea without the consent of the defendant in the absence of fraud and misrepresentation (CPL 220.60[3]). (See, Matter of Lockett v. Juviler, 65 NY2d 182).

Although the court's ruling in dismissing the felony count was oral and later, on reflection, it was attempted to be withdrawn, full agreement having been reached prior to the withdrawal, and there being no change in circumstances the defendant was entitled to the benefit of the bargain (see, Matter of Crooms v Hon. Michael Corriero, 206 AD2d 275, lv denied 84 NY2d 809; Matter of Helbrans v Owens, 205 AD2d 775, app dismissed 84 NY2d 861).

All concur except Sullivan, J.P.
and Williams, J. who dissent in

a memorandum by Sullivan, J.P.
as follows:

SULLIVAN, J.P. (dissenting)

In this Article 78 proceeding petitioner, on behalf of George Morris, a defendant in a criminal proceeding, seeks, inter alia, to compel respondent, an acting Justice of the Supreme Court of the State of New York, to sentence Morris (hereinafter defendant) to a three-year term of probation in accordance with a plea bargain entered into with respect to defendant's plea of guilty of criminal possession of a weapon in the fourth degree, a misdemeanor, the surviving charge in an indictment. After respondent had orally dismissed the only other count, the felony of criminal possession of a weapon in the third degree, and defendant had pleaded guilty to the remaining charge, respondent realized that he had ruled in error, reinstated the dismissed felony charge, and afforded defendant an opportunity to withdraw his plea.

After being indicted for both offenses, defendant was arraigned and entered a plea of not guilty. He thereafter, as part of an omnibus motion, sought inspection of the grand jury minutes and dismissal of the indictment on the basis of legal insufficiency. After submission of the motion, the court, at a May 10, 1994 calendar call, orally dismissed the felony weapon charge without comment or assigning any reason therefor. At the next calendar call, on June 7, 1994, when petitioner, defendant's attorney, asked for a copy of respondent's decision she was advised that a decision had "probably" been filed with the clerk. The matter was adjourned to August 1, 1994 for a suppression hearing as to the surviving charge.

When the prosecutor appeared before respondent on August 1, 1994, she was informed that defendant was going to plead guilty to the remaining misdemeanor charge and, in response to a request for respondent's written decision, was told that she should have obtained a copy of it. Defendant then, without any objection of record from the prosecutor, withdrew his previously entered not guilty plea and, in exchange for a promised sentence of probation, pleaded guilty to criminal possession of a weapon in the fourth degree, admitting that, on November 9, 1993, he possessed a loaded gun in his waistband.

On the same date, when the prosecutor called respondent's law secretary, asking for a copy of the decision, she was told that the decision was still being prepared but that it would reflect that the evidence before the grand jury was sufficient to sustain the indictment. In fact, in the decision the prosecutor subsequently received, dated July 29, 1994, respondent found the evidence to be sufficient to sustain the indictment and that the grand jury proceedings were not, in any manner, defective.

At the scheduled sentence on October 21, 1994, respondent, sua sponte and over defendant's objection, reinstated the previously dismissed count charging criminal possession of a weapon in the third degree, explaining that the previous dismissal was "incorrect" and that "[w]hen the matter was reduced to the written decision, [he] realizing [his] own error, corrected [him]self." Respondent then withdrew his earlier decision dismissing the felony count and reaffirmed his July 29, 1994 decision.

Petitioner thereupon commenced this Article 78 proceeding to prohibit respondent from vacating defendant's

plea of guilty of the misdemeanor of criminal possession of a weapon in the fourth degree and to compel respondent to sentence defendant in accordance with the terms of the plea bargain. Since petitioner fails to state a cause of action cognizable under Article 78 of the CPLR, the petition should be dismissed.

Analyzing the essence of petitioner's complaint - that the court cannot reinstate the previously dismissed felony count and vacate his misdemeanor guilty plea - it is clear that the court acted within its power and that therefore the petition should be dismissed in its entirety. As this record discloses, when petitioner pleaded guilty on August 1, 1994 it was on respondent's mistaken belief that the indictment's felony count had been properly dismissed. On that same date, respondent's law secretary informed the prosecutor that a formal decision, the writing of which was still in progress, would find the evidence before the grand jury legally sufficient to sustain the indictment. That decision, dated July 29, 1994, stated, "The credible evidence adduced before the Grand Jury is legally sufficient to sustain the indictment." On October 21, 1994, the date set for sentence, respondent acknowledged, in open court, his mistake in dismissing the criminal possession of a weapon in the third degree charge, characterizing the previous dismissal of the felony count as "incorrect" and describing his actions in reinstating the charge as the court's correction of "its own error."

It is well settled that a trial court, prior to the commencement of sentence, has the inherent power to vacate an illegal or invalid plea. (See, People v Bartley, 47 NY2d 965; People v Pena, 169 AD2d 392, lv denied, 78 NY2d 957; cf., Matter of Campbell v Pesce, 60 NY2d 165, 167.) Thus, since respondent had, in his own words, ruled in error, he has the inherent power to vacate the plea, which

which would have been improper, prior to the imposition of sentence and to correct his own error and reinstate the previously dismissed charge (see, People v Bartley, supra, at 966; People v Pena, supra, at 393; People v Minaya, 54 NY2d 360, 364; cert den 455 US 1024.)

In that regard, this case is not similar to Matter of Crooms v Corriero, (206 AD2d 275, lv denied 84 NY2d 809), where the trial court vacated a guilty plea mistakenly negotiated by a prosecutor who had not properly communicated with his superiors. This court took care to note, "The matter at bar clearly involves no error on the part of the court." (Id. At 513.) Here, as noted, the issue revolves around the court's correction of its own error.

Nor, as petitioner argues, does Matter of Helbrans v Owens, (205 AD2d 775, app dismd, lv to app den, 84 NY2d 861) dictate a different result. There, the court improperly vacated, sua sponte, guilty pleas where the defendants apparently balked as the court, at sentence, offered defendants the choice of accepting enhancement of the promised sentences or withdrawing the pleas and proceeding to trial. Here, as respondent took pains to make clear, the guilty plea was the product of his own erroneous dismissal of a more serious charge, which dismissal respondent had the inherent power to correct. (See, People v. Bartley, supra, 47 NY2d at 966.)

Since respondent had the power to vacate the plea and restore the action to its pre-plea status, further proceedings are not barred by double jeopardy considerations. (See, Matter of Kisloff v Covington, 73 NY2d 445, 449.) In such circumstances there is no double jeopardy violation, since a vacatur of a guilty plea is not "the equivalent of an acquittal based on an adjudication as to the factual elements of the charge." (People v Bartley, supra, at 967.)

Moreover, since the proceeding did not "terminate" in a "judgment" - a conviction and the sentence imposed thereon (see, CPLR 1.20[15]) - but only in a "conviction" by virtue of a guilty plea (see, CPL 1.20[13]), the Double Jeopardy Clause of the United States Constitution" is not offended. (Cf., People v Moquin, 77 NY2d 449, 455.)

Accordingly, the petition brought pursuant to CPLR Article 78 to prohibit respondent from vacating defendant's guilty plea with respect to the charge of criminal possession of a weapon in the fourth degree and to compel respondent to sentence him in accordance with the terms of a plea bargain, should be denied and the petition dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 23, 1995

s/ Catherine O'Hagan Wolfe
Clerk